TRIBUNALS

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TRIBUNALS TRIBUNALS

Contents

Plus

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Judicial Studies Board

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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QUICK, CHEAP *and* SATISFYING

HAZEL GENN *looks at different types of alternative dispute resolution (ADR) and considers the potential for proportionate dispute resolution (PDR) in the context of tribunals.*

A central theme of the *Transforming Public Services* White Paper was the Government's interest in developing proportionate dispute resolution (PDR) services to meet the needs of users involved in disputes concerning public services. The objective of emphasising PDR, as explained in the White Paper, was to achieve satisfactory, quick and cost-effective solutions to problems and disputes, and to move away from the traditional reliance on courts and tribunals as the principal means of resolving disputes. In short, the Government wants to think creatively and to develop a range of tailored dispute resolution services that are appropriate for different types of disputes and better meet the needs of users.

One theme in this issue of *Tribunals* is proportionate dispute resolution. We begin with an overview of different approaches and then consider three pilot projects taking place for landlord and tenant (page 5), disability (page 8) and employment cases (page 10).

What is ADR?

Alternative dispute resolution (ADR) is an umbrella term covering a relatively wide range of processes for resolving disputes. These processes are described as 'alternative' in the sense that, although they stand beside formal adjudicative proceedings in courts or tribunals, they are chosen by the parties in preference to formal adjudication as a means of dispute resolution. Most ADR processes have the potential for resolving disputes at an early stage in a way that is less formal, less costly, and more satisfying for the parties involved in the dispute than formal adjudication. The most common processes referred to under the ADR umbrella are arbitration, early neutral evaluation, conciliation and mediation.

Arbitration is a private process in which an expert arbitrator, chosen by the disputing parties, hears both sides of the dispute and issues a decision which is binding on the parties. It has much in common with court and tribunal adjudication, but is voluntary, private and can involve either oral or paper hearings.

In *early neutral evaluation* an evaluator with legal or other expertise reviews the core of evidence from the parties at an early stage in the case and offers an assessment of the strengths and weaknesses of each side's case in the hope of promoting an early settlement of the dispute.

Conciliation involves a neutral third party taking a proactive approach to achieve a settlement between the parties and may offer a view on the merits of the parties' respective cases.

Mediation is the most wide-ranging and commonly used ADR technique. It is a voluntary process in which a neutral and independent mediator helps the parties to reach an agreement that is acceptable to both sides and that will bring the dispute to an early conclusion. A mediator – unlike a judge or a tribunal – does not have any authority to decide on the issues or to force the parties to reach an agreement. Mediators view disputes as problems that need to be solved in a practical but definitive way, rather than emphasising strict legal rights. Their objective is to bring about a settlement, or at least to make the key issues clearer. Mediators will discuss each party's grievances, interests and priorities, to see where there is scope for compromise and to help the parties move towards a settlement that both find acceptable. The parties decide the terms of the agreement and

although mediation is a non-binding process, a signed mediated agreement is a legally-enforceable contract.

In Great Britain, mediation has developed significantly since the mid-1990s and is currently being used in a variety of areas of dispute, including divorce and separation, small claims, business disputes, neighbour and boundary disputes, medical negligence and personal injury, workplace, consumer, community care, education, youth crime, housing, as well as international and cross-border disputes. Mediation can be used in cases involving only two parties and those involving a large number of parties or entire communities.

What happens in mediation?

Mediation is an assisted negotiation. The process is flexible and confidential and the parties remain in ultimate control of the decision to settle and the terms on which settlement is reached. Even where (as with some schemes around the world) parties are required to attempt to mediate their dispute, there is never any compulsion to reach a settlement and the parties are generally free to leave the mediation at any time.

> *'. . . mediation and litigation are not exclusive alternatives. They co-exist in a symbiotic relationship . . .'*
>
> David Richbell and Tony Allen, *Mediation Background Paper*, prepared for Civil Justice Council Judicial Awareness Workshop, April 2005

In non-family disputes, most mediations start with a joint meeting with everyone sitting around a table. Parties may attend with or without legal advisers or other representatives or friends. The mediator explains the process and parties have an opportunity, without interruption, briefly to present their position on the key issues that need to be addressed if settlement is to be achieved. This opening session gives the parties a chance to hear the other person's position and to respond. This may be the first time that the parties have communicated directly since the beginning of the dispute and it is an opportunity for the mediator to help the parties to understand why each feels strongly about their case.

Following the opening session, the parties will often separate into different rooms for private meetings with the mediator (sometimes called caucuses). The mediator shuttles between the parties, gathering information in confidence and exploring the strength and weakness of comparative positions. It is important for the mediator to earn the respect and trust of each party so that the conditions for confidential exploration of issues and creative problem-solving are established. Once the scope for settlement has been found the parties will be brought back together to finalise the terms of the agreement. In family mediation, parties remain together at all times during the course of the mediation and legal advisers are not permitted to accompany either party.

Mediators require considerable skill in helping the parties to maintain control of the process while assisting in breaking deadlock. Their task is to restart negotiations if they stall; keep communication between the parties open; offer a fresh perspective on the issues in dispute; help the parties to explore creative solutions and move towards a quick and cost-effective settlement.

Mediation usually lasts for a day, although there are several successful court-based mediation schemes around the country for non-family disputes where mediations are limited to three hours (see *www.dca.gov.uk/civil/adr*).

What are the benefits of mediation?

Informality

Mediations are flexible and informal and use the less alienating language of problem-solving rather than that of strict legal rights. Mediations are generally held in offices or hotels and, if a court building is used, the mediation will generally take place in a meeting room rather than a hearing room.

Speed

Mediation can be attempted at any time during the course of a dispute – as soon as an issue occurs, once evidence has been collected and the parties are clearer

about their positions, just before a hearing, or even after a hearing has started but prior to a decision. The earlier mediation is tried, the less likely it is that parties will have become entrenched in their positions and the greater will be the likely savings in cost and inconvenience.

Compromise

Mediators argue that the crucial difference in mediation from most other forms of dispute resolution is that no one tells the disputing parties who is right and who is wrong and it is for the parties to decide whether the outcome that emerges from mediation is acceptable. The process allows room for 'principled differences' in the interpretation of facts and issues and can deliver solutions that meet the needs of both or all the disputing parties – the so-called 'win-win' (which may cover equality of pain), as contrasted with the normal 'win-lose' of adjudicated outcomes.

Creative settlements

One of the most commonly cited benefits of mediation is the scope for creative compromise. Remedies are not limited to what the law will permit and, because the parties control the terms of the agreement, settlements can be creative and far-reaching, providing recompense but also being forward-looking. These might include an apology, an explanation, a change in behaviour, policy or procedure, a promise to do or avoid doing something, compensation, a refund or replacement of goods.

Remedies are not limited to what the law will permit and . . . settlements can be creative and far-reaching . . .

Preserving or restoring relationships

Disputes often involve parties who, despite their differences, are either locked into a continuing relationship or would like to continue to have a relationship. Examples are employers and employees, businesses who regularly trade with each other, landlords and tenants, neighbours, schools and pupils, and of course separating husbands and wives or partners who have to co-operate over the care of children. Because mediation provides a controlled environment in which communication can be re-started and where the parties are encouraged to reassess their case and look to the future rather than the past, mediation has the potential to repair damaged relationships or to prevent relationships from completely breaking down.

Cost

Because mediation promotes settlement, the cost and inconvenience of trials or formal hearings (to parties and the justice system) can be avoided where mediation is successful.

Customer satisfaction

All of the research evidence to date shows that where mediation is successful in achieving settlement, parties are generally very positive about the experience. They value the speed and informality of the process, the opportunity to be heard, the focus on the key issues, the skill of mediators, the opportunity to fashion their own settlement, and perceived savings in cost and time.

Risks in mediation

Although mediation enjoys generally high levels of customer satisfaction, research has revealed some of the risks. For example, even when mediation is successful, parties may sometimes feel that they were pressured into settlement and that they compromised more than they would have wished. In some cases, parties sense that they are at a disadvantage during mediation if they feel that they are less experienced in negotiation or less powerful and articulate than the opposing party – and this may be a particular problem where people attend mediation without an adviser. It may also be a factor in considering the scope for mediation in citizen v. state disputes.

Other complaints tend to arise when mediation has been unsuccessful in achieving settlement. In such cases parties might feel that the mediator was not sufficiently skillful, that the opposing party was intransigent, and that the mediation had involved additional cost and increased delay in resolving the dispute.

Although such complaints are in the minority, these issues need to be borne in mind when developing ADR schemes and, in particular, when parties are being encouraged or even pressured into attempting mediation or other ADR methods. It is important that there is a good fit between the type of case and people involved in the dispute and the alternative dispute resolution processes selected. In other words *alternative* dispute resolution must also be *appropriate* dispute resolution.

How could PDR work in tribunals?

People generally appeal to a tribunal because they feel a sense of injustice about a decision that has been made or the way that they have been treated, but there are numerous ways in which these disputes or differences of view can occur.

Initial decisions may have been based on insufficient information because forms were misunderstood and inadequately completed. An initial decision-maker may have made an error in applying the relevant law or regulations or misinterpreted the factual situation of the appellant. Alternatively, an individual may misunderstand their entitlement and feel a sense of injustice about the law, although the law has been correctly applied.

. . . what users of the justice system want is relatively stress-free, speedy and affordable dispute resolution

We know from research that what users of the justice system want is relatively stress-free, speedy and affordable dispute resolution. People want to solve their difficulties or differences and get on with their lives.

In the articles that follow, examples are given of experiments in tribunals currently under way with mediation in landlord and tenant and employment disputes. On the other hand, Michael Harris explains why in disputes regarding disability benefits, negotiated compromise by means of mediation may be inappropriate, although scope exists for resolving cases without a tribunal hearing using early neutral evaluation. The three experiments are examples of how an approach to dispute resolution in tribunals, based on the principle of PDR, may offer a more satisfactory and satisfying service to tribunal users without the need for a full tribunal hearing.

Relevant issues

In considering the scope for introducing *proportionate* and *appropriate* dispute resolution processes into tribunal proceedings, it will be important to bear in mind the variety of cases and parties that might be involved. Issues that should have a bearing on the design of PDR processes include:

- The basis of the entitlement or grievance in contention. Is there scope for compromise? Is it appropriate to consider compromise?
- What is the range of possible outcomes?
- The complexity of the issues and what is at stake for the individual.
- The situation of the person bringing the complaint, grievance or challenge. Do they have the benefit of an adviser? Will they be able to negotiate effectively if mediation is being considered?
- Would a discussion help to clarify the position and resolve the issue without a hearing?

Most importantly, in our system of justice there is a fundamental need to demonstrate the integrity and independence of any dispute resolution process. In disputes or grievances involving citizens and the State, this need may be even more critical given the sense of many people that they are powerless to affect the actions of public authorities. Those challenging such actions and decisions must be confident that the eventual outcome of their challenge has been achieved by a fair process.

HAZEL GENN is Professor of Socio-Legal Studies at University College London.

For comprehensive information about ADR, see *www.adrnow.org.uk*, and for a range of DCA initiatives and pilot projects, see *www.dca.gov.uk/civil/adr*.

PERSISTENCE *is* THE KEY

The Residential Property Tribunal Service continues its quest for successful mediation.

SIOBHAN MCGRATH *thinks she has learnt the essential components of a successful scheme.*

The confidence in mediation as a means of resolving disputes varies from person to person and from jurisdiction to jurisdiction. What actually constitutes mediation is itself a matter for debate. The Residential Property Tribunal Service (RPTS) is now mid-way into a pilot mediation scheme.

This article describes the experience so far and flags up some of the difficulties encountered and lessons learned.

Motivation

We did not decide to run a pilot mediation project to be fashionable. Nor did we hope simply to save administrative costs. Instead, the impetus came from a recognition that, in some cases, the tribunal process itself operates to polarise views and to extend disputes. We were seeking an alternative and appropriate means of resolving disputes.

Emotions run high and the fear of losing face or losing ground dominates.

The RPTS deals with landlord and tenant cases. Until recently, our jurisdictions were predominantly party and party. The cases vary from the very high value in some leasehold enfranchisement cases, to increases in rent of less than £5 a week for regulated tenants; from fine points of law to the analysis of bread-and-butter facts. Some parties are represented, many are not. What they all have in common, however, is an instinctive desire to defend their property. Emotions run high and the fear of losing face or losing ground dominates.

It is unusual to have a single-issue case. Parties tend to ask the tribunal to resolve as many issues as possible and produce voluminous documentation for fear that something may be missed. As a result, the scope of applications expands and, although a certain amount can be done to restrict the ambit of a case, it is sometimes difficult to properly adjudicate without hearing what eventually turns out to be irrelevant evidence or submissions.

To some extent, the tendency for issues in cases to multiply is partly explicable by a failure of parties to communicate. This is either because of the nature of the relationship between a particular landlord and tenant, or because of a hesitancy in the process itself. We therefore considered whether mediation might have a place in some cases, giving the parties a neutral forum in which to communicate, which might take the matter forward to a concluded agreement.

Initial steps

We started in the late autumn of 2004 by deciding to run a pilot mediation project in the London region of RPTS. First, we contacted experienced London chairmen who were also trained mediators and met to put together a suitable mediation scheme. The advice of the mediators was that the pilot should be tested on service charge disputes, where it was becoming increasingly clear that disputes could have been avoided if proper disclosure had been given, either as part of the day-to-day management of a property or after a dispute had blown up but before the parties became entrenched.

It was agreed that one of the chairmen would draw up a model mediation agreement for comment by others. The main point of contention at this stage was whether there could be any circumstances where chairmen, acting as

mediators, would offer early neutral evaluation of issues between the parties. One school of thought was that the mediation ought to remain facilitative and that offering an opinion on the merits of a case could only be counter-productive. On the other hand, if it was clear that a party's case was flawed as a matter of law or because of the paucity of evidence, it seemed foolish to allow the case to go forward to hearing without such an opinion being offered. In the end, a compromise was reached where a mediator would give an opinion on the merits, exceptionally, and at the request of both parties. This is clearly stated in the mediation agreement.

We decided that each member of the administrative staff dealing with the particular case would also be responsible for dealing with the administration of the mediation. We produced explanatory leaflets that were sent out to parties in all service charge cases, with a request that they contact the office if interested in taking part in the scheme.

We agreed that mediation would only be undertaken if both parties consented. If mediation failed, then the mediation file would be separated from the main case file and the mediator would have no further dealings with the case.

Problems

The project failed entirely, and although a few parties expressed interest, no mediations took place. After several months we tried to identify what had gone wrong, and identified the following problems.

- Parties were unsure what mediation meant and were concerned that any solution obtained by mediation would be inferior to a full adjudication.
- Staff were at a disadvantage in explaining mediation to parties, as they had not been given training in mediation themselves.
- Tribunal members, other than the mediators, were unsure of how mediation would fit with the usual tribunal procedures, and there was a proper reluctance to delay the timetabling of hearings in a jurisdiction where, historically, delay had been a significant problem.

Addressing the issues

Encouraged by the experience of other similar residential property tribunals in other countries such as New Zealand and Australia, we decided to try again. In particular, we recognised that work needed to be done on the early stages of the process, and that the training of staff and the provision of support and information for parties was pivotal to the success of the project.

Mediation friends

In the summer of 2005, we made contact with the BPP Law School who were interested in our pilot and were willing to offer support through their pro bono 'mediation friends' project. Students are trained to provide support to those involved in mediation. They are tutored in the objectives and processes involved in mediation and in providing support rather than representation to parties involved in a dispute.

BPP were willing to organise a formal link with the tribunal so that parties could be referred to students, who would be able to explain the mediation process and the possible outcomes. When available, students would also attend mediations with unrepresented parties to provide support.

Training

We identified five staff who would become familiar with the administration of mediation hearings and who attended the BPP student training. Together, we drafted detailed desk instructions on dealing with mediation and composed standard letters to use in the process.

Members

We also encouraged members to recommend mediation in cases where oral pre-trial reviews were held. In particular, we explained that the timetable for the hearing and for compliance with directions should only be affected minimally and that mediation should run in parallel to the normal preparations for hearing. Furthermore, BPP students agreed to attend the tribunal every Wednesday to be available for parties to discuss whether mediation should be attempted.

This meant that chairmen could refer parties to the students immediately, and in many cases the students sat in on the pre-trial review hearings to obtain an initial understanding of the case and the issues for the parties.

Relaunch

In December 2005 we relaunched the scheme for a further six months. So far, it has been extremely successful. At the end of March 2006 there had been 18 requests for mediation and 12 mediations had taken place. Of these, 10 were successful, in that agreement was reached, and the others were pending.

Initially, the mediations are set down for two hours of negotiations. Sometimes the mediations have taken longer (one went on for eight hours, but ultimately resulted in an agreement); seldom do they take less. There is a tension between the best method of resolving housing disputes. Since landlords and tenants have a continuing relationship it is contended that agreement is better than adjudication. There is a counter-argument that it is easier to lose than to compromise, and to live with the consequences of that compromise. The feedback from the mediators is, however, very positive. In the cases they have dealt with, they are content that the parties have achieved as much, if not more, than they would have at hearing.

Pivotal to the success of the project has been the involvement of the administrative staff.

The mediation staff are, if anything, even more enthusiastic and they are cascading their mediation training to colleagues.

At this early stage we have not settled on the best way to consult parties for their views on the success of the project. However, we have received only one complaint, which was oral rather than in writing, and which proved to be unfounded.

Future

From a very disappointing start, we think that we are on the way to getting mediation cracked. At the end of the pilot we will review the scheme and processes and consider whether it can be expanded further and extended to other regions of the country.

In April 2006, we were given new jurisdictions under the Housing Act 2004, to deal with appeals against local authority decisions to take action on housing conditions and the licensing of houses in multiple occupation. Unlike our party and party jurisdiction, we will be dealing with administrative appeals. If mediation can work in this new field, it will be a significant success.

The lessons that have been learned to date are probably of general application. Pivotal to the success of the project has been the involvement of the administrative staff. They have the first contact with parties and can inform and reassure. Resolving disputes by mediation is not confined to the final mediation appointment, it is the whole process of agreeing to mediate, preparing mentally to mediate and having security in the mediation process.

In addition to the staff, members have also accepted the benefits of mediation and in turn have been able to reassure parties that if mediation is tried and failed, this will not prejudice the fairness and independence of any later adjudication.

We are confident that mediation has a useful role to play in some of our cases. It will only work, however, if the adjudication process remains accessible and effective when mediation fails. At this stage, we believe that mediation should not be mandatory. Instead, parties should be given information and support that will enable them to make an informed decision about whether to engage in the process or not.

In conclusion, however, perhaps the most important factor in setting up a mediation scheme is persistence.

SIOBHAN MCGRATH is Senior President of the Residential Property Tribunal Service.

INNOVATE *to* EVALUATE

MICHAEL HARRIS *describes the Appeal Service's attempt to find out whether some classes of the appeals they hear might be resolved fairly without a tribunal hearing.*

Everyone agrees that it would be a good thing to be able to resolve disputes fairly without having to go through the entire tribunal process. The new Tribunals Service is running two pilots on alternative dispute resolution, one with the Employment Tribunals and the other with the Appeals Tribunal. This article is about the second of these, which will start in the summer of 2006 and is expected to run for a year.

Background

The pilot in the Appeals Service will concentrate on hearings relating to attendance allowance and disability living allowance, which together constitute the largest area of our work, amounting to 77,000 appeals a year. In 50 per cent of the cases, appellants get a higher award from the tribunal than the department had been prepared to give them. Neither benefit is tightly prescribed by regulation, and judgements have to be made on a wide range of differing factual situations.

Not mediation

In designing the pilot, we are unlikely to draw much inspiration from mediation in civil cases or family law cases. There, the dynamics that encourage people to settle are quite different. Instead, we need to concentrate on the department's obligation to make decisions that are impartial and in accordance with the law. We cannot ask applicants to accept less (or encourage them to seek more) than that to which they are legally entitled.

In mediation, the objective is to settle the dispute, whether the outcome is legally correct or not. In the field of administrative law, the only legitimate objective is to find the 'legally correct' answer.

In the field of administrative law, the only legitimate objective is to find the 'legally correct' answer.

If an applicant is dissatisfied with the departmental decision, his only recourse is to ask the tribunal to adjudicate upon it. He is entitled to an oral hearing. What the pilot will explore is whether we can find the right answer without going as far as the hearing.

Neutral evaluation

If the Appeals Service looked at all cases as they came in and formed a preliminary view of the likely outcome, it might be able to identify those cases where further discussion with the parties might secure an earlier resolution of the dispute. This is neutral evaluation. The department might be amenable to that approach and might be willing in appropriate cases to revise its original decision in favour of the appellant. We want the pilot to tell us how often that is likely to happen.

Our current processes do not cover this form of dispute resolution, and we will therefore need to conduct the pilot outside the present statutory framework. This means that, for the time being, we will keep the pilot process and the formal tribunal process quite separate. This will make it easier for us to win the confidence of our users, who need to be assured that the pilot process will not prejudice a subsequent tribunal hearing, if one is required.

The judicial officers who will make the evaluation in the pilot will play no part in any subsequent tribunal hearing. Indeed, the tribunal members who hear the case

will not even be told that an evaluation had taken place. Of course, there is the risk that someone at the hearing will mention it – but the tribunal will do its best to ensure that no information is disclosed.

Voluntary

Initially at least, a pilot of this kind must be voluntary and appellants will need to opt into it. They need to know that if they participate, a tribunal judge may wish to contact them or an official in the department. They need to be assured that their rights to have their case heard orally are preserved. But they will be told that if they opt in, then there is at least a chance that their case can be resolved without them having to go to a tribunal, so avoiding the anxiety that that undoubtedly entails.

The pilot will establish how many appellants will want to participate in this kind of process. If this approach gains general acceptance, then consideration can be given to making it an automatic part of the process.

It is crucial that we do not put vulnerable appellants under any pressure.

Making contact

There is no real difficulty in contacting officials in the department, provided, of course, that contact can easily be made with the official who made the decision and knows about the case. Contacting appellants will have to be approached much more cautiously. It is important that we do not cut across the relationships between appellants and their representatives. The pilot will explore how best we can liaise with representative organisations so as to ensure that they are fully engaged. It is crucial that we do not put vulnerable appellants under any pressure.

After the pilot

Carrying out a pilot of this kind will be breaking new ground for our tribunal. We will be learning as we go along. However, doing the pilot is one thing. Deciding whether it is worth rolling it out is quite another. The neutral evaluation process that I have described comes at a cost (in, for example, the time taken to assess cases on paper). That cost has to be balanced by the financial savings that might be made where a tribunal hearing is avoided, and by the enhanced service that we are able to provide for our users.

The pilot will also challenge our traditional belief that the court-based model for resolving disputes is best. Most of us who have worked in courts and tribunals know that they do not provide the perfect solution. Hearings are artificial and can be intimidating. They favour those who are articulate. They also favour those who are good at lying. It is a good forum for resolving tricky points of law, argued by able advocates, and sometimes a court hearing is the only way in which some disputes will ever be resolved. But the impression one gains in many cases that come before tribunals is that if only departments had spent more time and care in making their decisions in the first place, and if only someone had given some sensible advice to appellants at the outset, it might all have been avoided. So, neutral evaluation is but part of a package of measures that need to be put in place if a tribunal hearing is to be the exception rather than the rule.

There are encouraging signs in the Department of Work and Pensions that measures are being taken to improve the quality of decision-making. Similar efforts need to be made to provide early, good, and independent advice to those who are considering a challenge to the departmental decision. Tribunals have an important role in facilitating those developments. The White Paper urged us to innovate.

This pilot on neutral evaluation is a significant step to take and, if properly conducted, will tell us a good deal about how the new tribunal system might be able to adapt so as to provide the optimum service to those who need it.

JUDGE MICHAEL HARRIS **is President of Appeal Tribunals.**

The WIDER PRINCIPLE

The Employment Tribunals are to conduct a mediation pilot to work out a method of supporting the resolution of disputes without having to resort to a tribunal hearing. GOOLAM MEERAN *describes how.*

The Employment Tribunals receive in the region of 100,000 claims per year. A significant proportion of these claims involve allegations of discrimination at work. Judicial determinations involve substantial costs to the parties and the tribunal. Hearings are lengthy and stressful to the claimants, the employer, and witnesses on both sides.

I have been particularly concerned over the years, both as a practitioner and as a tribunal chairman, with the effect of a tribunal hearing on relationships in the workplace and the stress a hearing generates. Is there an alternative to lengthy and costly legal proceedings, which often deal with symptoms and not underlying causes?

While a judicial determination must remain an important safeguard for the rights and duties of both employees and employers, there must be more effective ways of resolving their disputes once internal procedures have been exhausted.

We are about to embark on a pilot study in three regions: Newcastle, Birmingham and London Central.

Problem and solution

While Acas (the Advisory, Conciliation and Arbitration Service) has a statutory duty to assist the parties in achieving a conciliated settlement, and the success rate is extremely high, there remains a residue of cases where the parties are unwilling to settle. Much time, effort and expense is incurred by the tribunal and the parties in case managing and preparing for a hearing. Some of these cases settle partway through the hearing. Others are fought to the bitter end.

Where there is an ongoing employment relationship, as in many discrimination cases, the working relationship is impaired, with individuals on long-term sick leave. Hearings cannot be convened expeditiously, partly because of the need for proper case management, and partly because of the non-availability of the claimant or witnesses, often as the result of stress. Hearings take several days, and sometimes weeks, ending in a judgment that does not necessarily go to the heart of the problem, and the damage caused through such protracted litigation is often irreparable.

What is the answer? One possible solution, which is being explored in the Employment Tribunals, is the offer of mediation facilities by an experienced and trained chairman mediator.

We are about to embark on a pilot study in three regions: Newcastle, Birmingham and London Central. These regions have been chosen as a result of their particular mix of cases, which includes a high volume of complex, multi-day discrimination claims.

The pilot will be subject to independent research with regular monitoring reports being provided to a project board.

Agreement

The mediation agreement will make it clear to the parties that there is no obligation on them to consent to mediation. Furthermore, at any stage it will be open to a party to decide that the process should be terminated. They will be given an assurance that the chairman involved in mediation will generally be disqualified from conducting any subsequent hearing should the mediation be unsuccessful.

Acas

The arrangements for the mediation pilot are being developed by the tribunal administration and judiciary in close collaboration with Acas. Such tripartite

cooperation should ensure that all issues are fully explored, with the initiative maintaining as its primary focus the benefits to users. The offer of mediation facilities will be seen as complementary to Acas's conciliation services, and not as a substitute for it.

Detailed protocols governing the relationship between Acas and the Employment Tribunals are being produced, to ensure that there is no confusion on the part of the users and to respect and preserve the principle of judicial independence, as well as Acas's independent conciliation role.

Results

A successfully mediated case should leave both sides with a greater sense of satisfaction, and with a preserved working relationship where there is no dismissal. The time saved by the Employment Tribunals will allow us to speed up our rate of case disposal. There is also a distinct prospect that a mediated settlement could go much wider than the strict terms governing remedies in discrimination cases, with parties free to agree terms that are wider than those of the statute.

In my opinion, a successful mediation has greater potential to tackle some of the underlying issues which affect the dynamics of the workplace, giving rise to potential, actual or perceived inequality. A key issue for the researchers to consider is whether mediation provides a greater degree of long term benefit to the users while, at the same time, helping to improve industrial relations by resolving employment disputes, wherever possible, in the workplace and not in the courts.

JUDGE GOOLAM MEERAN is President of the Employment Tribunals, England and Wales.

APPRAISAL *is* SURVEY HIGHLIGHT

JUDICIAL STUDIES BOARD

The Judicial Studies Board (JSB) has been conducting a training survey of tribunals, prompted in part by a request from the Senior President, Lord Justice Carnwath, and the Tribunals Judicial Executive Board (TJEB) in the spring of 2005. Thirty-five tribunals were canvassed through the medium of a postal questionnaire, formulated not only to collate the customary statistical information about current membership and caseload, but also to delve a little deeper into the constituent parts of the training programmes in tribunals.

Tribunals were asked to specify: the duration, topics and methods used in their induction and continuation training; the steps that had been taken to introduce schemes for appraisal and mentoring; and how each of these areas were organised and funded. Tribunals were also invited to comment on the methods they used to keep their members up to date with the latest judicial information, particularly through the use of IT and distance learning packages.

The work was completed in the spring of 2006 and the overall findings revealed the advances that have been made in tribunals in the past four years. The headline statistic has to be the almost uniform introduction of appraisal schemes, in which members are appraised, by and large, against the competences set out in the JSB guidance. Mentoring is another area of noted development, together with innovations in mediation and management skills. It was particularly encouraging to note that such developments were not restricted to the larger jurisdictions.

The final survey report has been presented to the Senior President, but the JSB intends to build on the survey through its ongoing programme of evaluation. The autumn 2006 issue of this journal will include a brief analysis of some of the key themes to emerge from the survey, and the impact that those developments, such as appraisal, have had in certain tribunals.

For further information, e-mail *tribunals@jsb.gsi.gov.uk*.

YOU ARE *in* CHARGE

How can tribunal chairs use their powers to enable the best possible decision to be made, while remaining fair to both parties? MARY KANE *gives some practical tips.*

Professor Hazel Genn's summary of her research *Tribunals for Diverse Users*, the subject of an article in the Spring 2006 issue of this journal, raises questions as to how a tribunal chair can ensure that tribunal users receive a fair hearing. How far can a chair intervene in the equality stakes without interfering?

Use the rules

Most tribunal jurisdictions are inquisitorial, and many have rules allowing the chairs to set the guidelines for how each hearing should be run. Feel free to use these rules to get the best result. You are in charge. Think about what your job as the chair of your specific tribunal entails, in particular what your remit is. It is your responsibility to make a decision. You can only do this if you have the necessary information obtained through written and oral evidence and questions.

The room

As a chair you are a combination of director, producer and ringmaster. The aim of every chair must be to ensure that, whatever the outcome of the hearing, the process should be seen by everyone as fair. Take control, set the scene – sometimes starting with simple matters. Furniture-moving is one example. Depending on your jurisdiction, you may sit in a variety of rooms and it may be possible to arrange the room to be as 'informally formal' as possible.

Make sure you can observe all parties easily and that they can see you and others without straining. Everyone should also be able to hear what is being said. Ensure that, if an interpreter is needed, they are in a position where they can best fulfil the role. If there is likely to be conflict between parties, consider whether the room is large enough and whether particular people should be separated. Check whether anyone needs disabled assistance and whether the room is suitable for your particular type of hearing.

The preparation

If you sit with others, at your preview make sure you all have the same papers and give members time to read additional documents. Do the same, through your clerk if you have one, with all the parties and representatives. Never let people think they are being rushed. Make sure that any omissions are dealt with as soon as possible.

A punctual arrival is important so that you can discuss the case with your colleagues. This will also give you time to sort out the practical points of the hearing described above. You all need to know what the issues are and how they are to be dealt with. Extra time spent at this juncture means less likelihood of missing vital points during the hearing. Consider any particular worries expressed, either by your colleagues or made by the parties in advance of the hearing. If appropriate, discuss and agree who will ask questions on any specific topic. Avoid seeing either party on their own. This can be a particular difficulty if a legal representative just asks for 'a few words before the hearing'. Ensure the other side is also there to hear the few words.

The introduction

Hazel Genn's research has shown how great the impact of the introduction can be. Each jurisdiction will have its own style, but each will need to: set out who everyone is, stress independence, clarify the remit and describe how the decision will be made, whether it will be given in writing, orally or both, whether it will be

explained at the end of the hearing and when it will be sent out. Describe what will happen during the hearing and the procedures to be followed and ensure the parties, whether applicants, prisoners or patients, know that they will be listened to and that you will be taking notes.

Each of your colleagues may have a different role in the hearing, but it may be clearer to the parties simply to introduce them by name as members of the particular tribunal. Ensure you know the names of everyone attending the hearing and that you know how to pronounce them. Draw yourself a map if necessary and use phonetic spelling to help you with unfamiliar names. No one else will see your notes!

The hearing

Your scene is set, you have the players there and can start the day. You may have a hearing with unrepresented parties, with parties who cannot read or for whom English is not their first language, with aggressive or difficult witnesses or representatives. What can you, as chair, do to keep the tribunal going well and fairly?

You will need to find a style that combines sensitivity and sympathy with judicial independence.

Interpreters

With interpreters, check their independence, check their own language is that of their client and that the two of them actually understand each other, and make sure you always talk to their client, not to them. Make it clear that you expect them to interpret everything, not just questions to their client. The client needs to understand exactly what is going on in the hearing for it to be fair.

Breaks

Some tribunals offer regular short breaks to applicants, to allow them to think matters over, give instructions to their representatives or simply catch their breath. Realising such a break is necessary is part of the responsibility of all members of the tribunal, but you, as chair, will need to be particularly aware of the need for such breaks and suggest them when necessary.

Unrepresented parties

If the applicant is unrepresented, then your problem is how to obtain all the information the tribunal needs without stepping over to the other side of the table. You will need to find a style that combines sensitivity and sympathy with judicial independence. Find out if they have read all the papers that they are entitled to see or whether help will be needed here, perhaps by way of a short adjournment and assistance from a clerk. Does your tribunal allow you to appoint a legal representative or other advocate, or might funding for representation be available, especially if the applicant has any literacy problems, or has a mental illness or disability affecting their ability to present their own case? And if so what opportunity has been given for the applicant to seek legal advice?

Consider hearing an unrepresented applicant's evidence first to establish what their case is. This may calm any understandable nervousness and put the applicant at ease. It will also enable you to ask questions of other witnesses based on what you have heard from the applicant if they are not able to formulate them. Few lay people understand how to pose questions. As chair, you must use your skills to reframe statements into questions, summarise evidence to make sure it has been understood, refocus parties who are losing the plot, check your understanding (and therefore everyone else's) of what is being said and asked and give the applicant time to answer. Always ensure that they do not stray too far from the points that need to be decided. Check details if you or anyone else is not clear what happened, and follow up questions asked by others to obtain more detail if necessary. If a party does not understand what is being asked, paraphrase the question. If they get stuck with answers, repeat the question or prompt them in an unbiased way. Use clear language and be patient and courteous at all times. Make sure your questions are simple and avoid jargon at all cost. Don't be afraid to admit your ignorance – if you don't understand, it's likely others won't either.

Witnesses

Ask each witness to give their evidence slowly so that a full note can be made. If the hearing is not being recorded it is your responsibility to write down the evidence, and there is nothing more frustrating to all concerned if you have to continually pause and ask for things to be repeated. Somehow you have to develop the art of taking down essential evidence, observing body language, controlling the hearing and making good eye contact. It can be done, but only you may be able to read your writing! You may need to ask a speaker to go a little slower. However, remember you are not expected to take down every word, but to produce a note that contains the essential information for your decision and your written reasons. Be firm yet considerate. Don't allow the hearing to drift into areas of irrelevance where evidence may become unnecessarily repetitive. Try not to let any party feel that they are being prevented from saying all that they need to. This can be difficult but a good chair will perform this balancing act with skill and adeptness.

The real difficulty lies in making sure you don't step into the defence advocate's shoes . . .

When you have heard the facts, consider if it would help the parties to summarise what evidence you have obtained, relating it to the particular remit of your jurisdiction and giving the unrepresented applicant time to consider if there is anything else to add. In many jurisdictions it is considered good practice to offer the applicant the last word before any submissions are made, to ensure they have said everything they want to.

Keeping it fair

What else can you do to help the unrepresented party, and while helping them obtain what you need by way of evidence? Ask questions yourself, based on the issues that you so carefully identified in your preview. Remember, it is the answers to your questions that provide the evidence on which to base your decision, and if you have noted down the answers you have the basis of your reasons already there.

The real difficulty lies in making sure you don't step into the defence advocate's shoes when trying to elicit all you need from an unrepresented applicant. It is important at all times to stay objective, to listen to all parties, not to interrupt either side, save to keep the hearing on track, and to be as even-handed as possible. Call each party by name, rather than 'he' or 'she', invite both sides to give their stories and ask questions. It may help if, during the preview, you agree with your colleagues how to handle the situation and at the start of the hearing you explain to everyone that you will be taking account of the fact that so and so is not represented and how you will be dealing with this. Each jurisdiction may differ but so long as you are open, courteous, patient and objective with everyone present, it would be hard to describe the hearing as not fair.

A situation that might cause problems with an unrepresented applicant is where a point of law or procedure is brought up during the hearing, either by the tribunal or any other party. How can you deal with this? Consider explaining the point and all issues involved in a simple way. Check the parties' understanding, not only by asking directly but perhaps by asking them to tell you what their understanding is. Ask them again if they need time to take advice, depending on the consequences of the point raised. Ask them for comments, ask questions to clarify matters and, after all comments have been heard, discuss the matter with your colleagues in the absence of all parties. Above all, keep things simple, take your time, be confident you have explored all the issues, asked all the necessary questions, have enough information to make a reasoned and informed decision and have good enough notes to be able to write the reasons. In this way, the unrepresented applicant and all parties should leave the hearing, if not happy with the result, at least satisfied that you have given them all a fair hearing.

MARY KANE sits on a number of tribunals, including the Mental Health Review Tribunal and the Parole Board.

A LOGICAL APPROACH

ANDREW BANO *describes the methods available to a tribunal in finding facts and in deciding the weight to be given to a particular piece of evidence.*

The issues that tribunals have to deal with are often every bit as complex and difficult as those that are decided by courts. For example, a social security tribunal deciding whether back pain results from an industrial accident may have to deal with very similar medical questions as a court hearing a damages claim arising out of the same accident. The consequences of a tribunal's decision are also often just as important to the parties. However, cases before tribunals are often much shorter than court cases dealing with similar issues, and most tribunals do not have the same opportunities as courts for resolving factual disputes by means of examination and cross-examination of witnesses.

The evidence before a tribunal may come from a number of sources.

'Reasoned judicial process'

The description of the 'reasoned judicial process' given by Henry LJ in *Heffer v Tiffen Green* [1998] *The Times*, 28 December as a process where '. . . the evidence on each issue [is] marshalled, the weight of the evidence analysed, all tested against the probabilities based on the evidence as a whole, with clear findings of fact and all reasons given' was given in an appeal from a court decision. However, the need to apply a logical approach to fact-finding, in which the undisputed facts that are certain, or almost certain, are used as the starting point for deciding the probability of the facts that are in dispute, is perhaps even more important in a tribunal context, where the opportunities for testing evidence by questioning witnesses may be comparatively limited.

Sources

The evidence before a tribunal may come from a number of sources. A tribunal hearing an appeal will generally have the material that was before the first-tier decision-maker, together with any new evidence that has been submitted to the tribunal and, of course, any oral evidence given at the hearing itself. Since tribunals are generally not bound by the common law rules of evidence, in most cases a tribunal will not be precluded from considering any of this material. However, the source and nature of the evidence, while not affecting its admissibility, may nevertheless be of crucial importance in assessing what weight the evidence should be given.

Weight

Take, for example, a social security disability living allowance case, in which the question to be decided is whether a claimant reasonably requires frequent attention in connection with bodily functions throughout the day.

Such claims are often referred to an examining medical officer, who will carry out a medical examination of the claimant and give an opinion about the extent of the claimant's care needs. In such cases, a tribunal will often feel able to treat the clinical findings of the examining medical officer as essentially factual and to accept them as accurate if there is nothing to put them in doubt. However, a similar degree of disablement may give rise to different care needs in different individuals and the assessment of such needs will often be largely a matter of opinion.

Even if an examining medical officer's clinical findings are accepted, a tribunal faced with conflicting evidence may need to be much more cautious before accepting without question the examining medical officer's

assessment of the extent of the claimant's care needs. In a tribunal context, the difference between evidence of fact and evidence of opinion does not affect the admissibility of evidence, but may crucially affect its weight.

Serious misconduct

In assessing probabilities, it is also necessary to bear in mind the common law principle that more cogent evidence will be needed to prove serious misconduct than misconduct that is less serious. Tribunals are sometimes called on to deal with very serious issues, for example, decisions such as whether a claimant was married to a person who paid national insurance contributions in a claim for widow's benefit.

A finding by a tribunal that a claimant has falsely claimed to be married to an individual will clearly need more compelling evidence than, for example, a finding that a claimant has exaggerated the extent of a disability.

Relevance

Since tribunals often have to make decisions on the basis of relatively slender evidence, it is particularly important to make sure that each piece of the evidence which is available to the tribunal plays a full part in the process of fact-finding.

A common mistake by tribunals is to disregard or place little weight on evidence that has not been obtained in connection with the tribunal proceedings. However, it is only rarely that relevant evidence cannot contribute in some way to a better understanding of the picture as a whole.

Evidence in documents written for unconnected purposes may well be more reliable than evidence obtained in connection with the proceedings, so that a report prepared, for example, by a consultant surgeon in connection with unconnected civil proceedings may well be extremely valuable in resolving medical issues arising in, say, a war pensions appeal.

Conflicts

Evidence from different sources may at first sight appear to be conflicting and, although a tribunal may ultimately have to reject evidence, it should not do so without first considering whether apparent differences in the evidence can in fact be reconciled.

Differences in evidence can often be explained by differences in the perspective of the witnesses. If a tribunal tries to evaluate an item of evidence in conjunction with all the other evidence, it will often be found that far from conflicting with other evidence, each piece of evidence contributes to a better understanding of the picture as a whole, or, in Lord Devlin's words, 'the text with illustrations'.

Differences in evidence can often be explained by differences in the perspective of the witnesses.

For example, cases involving children sometimes throw up what appear to be at first sight irreconcilable differences in the evidence. A school report will often describe a child whose behaviour is only very slightly out of the ordinary and who has no particular care needs in the school environment. Such evidence may appear in stark contrast with the evidence of the child's carers, or other professionals, painting a picture of a child requiring a very high degree of supervision.

In some cases it may not be possible to reconcile the different accounts of the child's behaviour, and a choice will have to be made. However, in many cases the differences in the evidence can be explained by genuine differences between the child's behaviour and needs in the school environment and his or her behaviour in a less controlled and secure environment outside school. In terms of Lord Devlin's metaphor, in such cases the different illustrations of the child's behaviour in different settings, and seen through different eyes, does not create a conflict of evidence, but contributes to a better understanding of the text as whole.

Experts

Although the involvement of experts is one of the defining features of the tribunal system, care must be

taken to ensure that the use of a tribunal member's expert knowledge does not lead to unfairness. In *Butterfield v Secretary of State for Defence* [2002] EWHC 2247 (Admin), Park J held that if a medically qualified member of a tribunal who was the only person present with specialist knowledge saw a possible medical objection to the claimant's case, he must draw it to the claimant's attention and if necessary offer the claimant an adjournment to consider the point 'however inconvenient and irksome that may be'. If a tribunal reaches a provisional conclusion on the basis of its own expert knowledge, the parties must therefore be given an opportunity of challenging the tribunal's view and, if necessary, offered an adjournment to enable them to do so.

Oral evidence

A logical approach to fact-finding can be used whenever the facts of a case are in dispute, and in many ways a 'paper' hearing offers a better opportunity than a hearing with oral evidence for tribunal members to develop the skill of making logical deductions from undisputed facts. But because the demeanour of a witness is such an unreliable guide to credibility, it will almost always be necessary to test the consistency of a witness's evidence against the facts that are agreed, or that can be established by other evidence. That is not to say that the way in which a witness gives evidence should be disregarded. The consultation exercise carried out by the Council of Tribunals and the research summarised by John Raine and Eileen Dunstan in the spring 2006 issue of this journal highlight the importance of the oral contributions of participants in tribunal proceedings. The way in which a witness gives evidence may, for example, add emphasis, convey uncertainty or indicate strength of feeling.

The experience of listening to a witness giving evidence is likely to be much more informative than reading a transcript, and a tribunal member may need to observe a witness carefully in order to get the maximum advantage from the opportunities that an oral hearing provides.

The starting point in assessing credibility is what Robert Goff LJ called in *Armagas Ltd v Mundogas SA* [1985] 1 Lloyds Rep 1 the 'objective facts and documents', but as we saw in the first article in this series (in the autumn 2005 issue of the journal), it will also be necessary to consider the motives of the witnesses and any interest they may have in the outcome of the dispute, how well placed the witnesses are to give reliable evidence, and the internal and external consistency of the evidence.

The key theme to emerge from the cases discussed in this series is that oral evidence should never be evaluated in isolation from the other evidence in the case. In the tribunal system, in which evidence is often sparse, it is perhaps even more important than in the courts to make sure that each piece of the evidence plays a full part in the decision-making process, and that the tribunal's conclusions are reached on the basis of the evidence as a whole.

ANDREW BANO is a Social Security Commissioner.

The chairman was finding it difficult to adjust to the concept of a paperless tribunal.

A 'HOW-TO' MANUAL

Is it possible to produce a generic practice manual for a range of different tribunals? They've managed it in Australia and NewZealand. PAMELA O'CONNOR *describes how.*

In April 2006, the Council of Australasian Tribunals (COAT) launched its *Practice manual for tribunals*. Its purpose is to provide a handy source of on-the-spot information and guidance and thus to establish best-practice standards for all tribunal members, whether legally trained or not.

General vs specific

Most tribunal manuals are written in a way that blends generic guidance on tribunal procedure with specific information on a particular tribunal's area of practice. It is hoped that this generic manual will allow tribunals to focus their efforts on their own tribunal-specific guidance and that tribunal members will ultimately possess a manual of three parts:

- Generic material.
- Tribunal-specific material.
- The member's own notes and precedents.

The manual is not primarily a training resource but a practical reference, a handy source of on-the-spot information and guidance for use by tribunal members in their day-to-day operations. It aims to assist members to:

- Identify and classify issues that arise in practice.
- Outline the relevant principles.
- List the alternative courses of action.
- Provide checklists of relevant considerations or criteria.
- Alert members to any relevant ethical, conduct or policy guidelines or procedural implications.
- Provide recommended word formulations.
- Give sources and references in case further reading is required.

There was some discussion about how to identify which topics were sufficiently important and generic to be included in the manual, since no comprehensive analysis of the training needs of members of Australian and New Zealand tribunals had ever been conducted. Since there was neither the time nor the resources to undertake a comprehensive training needs analysis of all tribunals, it was decided to survey a group of delegates from 12 of the largest city-based tribunals at a series of workshops.

The respondents were asked to identify topics that they wished to be included in the practice manual.

The respondents were asked to identify topics that they wished to be included in the practice manual. The results were consistent with findings in 1992 of a training needs analysis conducted by the Administrative Appeals Tribunal (Cth), indicating a measure of consensus as to what topics should be covered.

The responses to other questions indicated that the practice manual would be most useful if pitched at the level of continuation or update training, and aimed at members with up to five years' experience. Respondents also wanted a manual that was written for all members, whether legally trained or not, so as to promote a common standard of competence and best practice regardless of differences in members' roles and qualifications.

Based on these responses, the final project brief specified that the manual was to be a practical guide, consisting of nine chapters covering the following topics:

1 The nature of tribunals, including the functions of tribunals and their members, core competencies, the place of tribunals in the justice system, and the nature of administrative review.

2 The legal framework – common law and legislation and statutory interpretation.

3 Principles of tribunal processes, covering the rules of natural justice and related conduct standards.

4 Pre-hearing processes, including preliminary steps and alternative dispute resolution (ADR).

5 Conduct of hearings, covering preparation, questioning and listening skills, use of interpreters and dealing with unrepresented persons.

6 The decision-making process, including assessment of evidence and fact-finding, application of law, delivering oral reasons, decision-writing.

7 Communication skills, including two-way communication, cultural, linguistic and other diversity issues, dealing with the media.

8 Case-flow management, including adjournments, time standards and techniques for dealing with delays.

9 Conduct and ethical standards generally, inside and outside the tribunal.

A team from the Faculty of Law at Monash University in Victoria was selected to do the writing and editing, overseen by a sub-committee established by COAT who gave guidance on content and style and commented on draft material.

COAT envisaged that the preparation of the manual would be a collaborative project to which member tribunals would contribute. Its instructions to the project team were that the manual should 'build on existing tribunal materials to the extent possible and appropriate', some tribunals having already produced their own practice or induction manuals. COAT instructed the writing team to examine these resources to identify any material suitable for inclusion in the new manual. In the final result, the authors borrowed very little text from existing practice manuals, since most of them interweaved the generic and specific material. Examining them was nevertheless a useful exercise, as it assisted the authors to identify the common matters that tribunals wished to impart to their members, and to glean some useful examples.

The new manual was finally launched on 7 April 2006 by the Attorney-General of New South Wales. It has been distributed to all COAT member tribunals by Internet download from COAT's website. COAT proposes to conduct an evaluation survey of members a few months after release of the manual, and will also determine arrangements for updating it.

The manual . . . is pitched primarily at the continuation rather than the induction level.

Following the successful and timely completion of the manual project, COAT is now turning its attention to the development of training programmes, with induction training as a priority.

The manual will prove a useful training resource, although it is pitched primarily at the continuation rather than the induction level. It contains much that is useful for induction training, such as advice on how to use interpreters, questioning and listening skills, managing the hearing, limits of the tribunal's jurisdiction and powers, the nature of administrative review, principles of natural justice and how to write decisions. More importantly, it demonstrates the interrelationships between these topics, and makes them more meaningful by integrating them into a coherent conceptual framework.

ASSOCIATE PROFESSOR PAMELA O'CONNOR was a member of the Monash University team that wrote the manual. The article was written with the assistance of John Lesser, Deputy Chair of COAT (*www.coat.gov.au*), and draws on the project brief written by Livingston Armytage.

A DRIVE *for* INDEPENDENCE

The Tribunals Service was launched on 3 April 2006. PETER HANDCOCK *considers its priorities.*

It is five years since Sir Andrew Leggatt published his highly influential report on reforming the tribunals system. With the creation of the Tribunals Service, where do we stand in relation to its vision? Have we created a service that meets the report's aspirations?

Independence has always been imperative – the Leggatt Report acknowledged the correctness of the Franks Committee's view that tribunals should be 'independent, accessible, prompt, expert, informal and cheap', but stressed that independence was the primary aim. It candidly stated that tribunals were not perceived to be independent, supporting this statement with the oft-quoted 'to users every appeal is an away game'.

> [A Tribunals Service] would bring greater administrative efficiency, a single point of contact for users, improved geographical distribution of tribunal centres, common standards, an enhanced corporate image, greater prospects of job satisfaction, a better relationship between members and administrative staff, and improved career patterns for both on account of the size and coherence of the Tribunals Service.
>
> *Tribunals for Users – One System, One Service*
> **Sir Andrew Leggatt**

The drive for independence has been the major motivation behind all that we have done and I believe a unified Tribunals Service located in the Department for Constitutional Affairs will increase public confidence. By separating the tribunal from the initial decision-maker, we can ensure that justice is not only done but, just as importantly, is seen to be done.

But independence is not our only goal. Leggatt also identified many practical delivery benefits that can only be achieved by a unified service. Many of these benefits stem from having a joined-up approach to resources and infrastructure. There is no doubt in my mind that the comparative isolation of individual tribunals, and the absence of anything approaching a coherent system, has operated to the detriment of their development and the service that they deliver.

The creation of the Tribunals Service offers us real opportunities to change this for the better, to the benefit of our users, judiciary and staff. We will be able to offer a genuinely better service to all our users by sharing our resources, experience and expertise. But, to do so, we will need to be prepared to change and innovate, for example in the way we share our estate. Through pooling our resources we hope to develop over time a single shared national network of tribunal centres, providing access to multiple jurisdictions from a single site, supported by an integrated administration.

Another area that Sir Andrew identified as having the potential to be significantly improved is information technology. I believe sharing our experience, expertise and money will enable us to get better value from the money available for investment in IT. We will also be able to take full advantage of a single coherent Tribunals Service workforce enabling us to share the load across jurisdictions, in turn providing more effective support to our judiciary and to our users. The size and scope of the Tribunals Service will also provide better career opportunities for our staff than were available in the isolated individual tribunals of old.

Sir Andrew's vision for a unified Tribunals Service was and is a challenging one. We have made a start on delivering this aspiration. Confidence in the independence of tribunals will, I am convinced, continue to grow and we will improve the services we deliver. Although I recognise that change is rarely easy to deliver and will challenge us all, the opportunities and benefits are enormous. I am determined that we should build a Tribunals Service of which we can all be proud.

PETER HANDCOCK is the Tribunals Service Chief Executive.

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