Judicial Studies Board

TRIBUNALS
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Editorial

This issue of the journal has a mediation theme – inspired in part by the presentations given on the same theme at the Senior President's conference in May 2010. The Senior President has noted, on page 5, that mediation, along with other forms of alternative dispute resolution, were an important part of the considerations of Sir Andrew Leggatt in his original Report in 2001, and of the subsequent White Paper *Transforming Public Services: Complaints, Redress and Tribunals* in 2004. The quotations from both of those seminal documents serve as a reminder of the centrality of mediation to the resolution of disputes.

In his article on page 2, Sir Henry Brooke brings his considerable experience of mediation as part of a reflection on the role it might play in civil disputes more widely. On pages 6 and 9, Jeremy Bennett and David Latham go on to describe pilots conducted in two jurisdictions on alternative ways of resolving certain disputes more quickly, and what might be learned and applied from those pilots.

The second of our e-mail alerters was sent out in early December – designed to herald some of the content in this issue of the journal and to provide additional content more readily available in a digital format. I have had a number of positive responses to the new alerter (and, possibly as importantly, no negative ones), and am grateful to those who took the time to e-mail me.

All comments from our readers are always welcome, whether it concerns journal content, style or mode of delivery. For those, and for requests to receive future issues of the alerter, please e-mail the address below.

Finally, the eagle-eyed among you will have noticed from the front page of the journal that, as in nature, seasons have moved from autumn to winter 2010. Our more seasonal arrival has permitted us to expand and enhance the range and blend of our content.

Kenny Mullan

Comments to *publications@jsb.gsi.gov.uk*.

Fairness in courts and tribunals

The Equality Act 2010 represents the single most significant development in equality law for the past 40 years. The Act consolidates existing statutory provision – previously spread disparately over various legislative measures – and thus harmonises discrimination law while strengthening existing provision and creating new duties and rights.

The booklet *Fairness in Courts and Tribunals* has been updated to reflect those changes, and its publication timed to coincide with implementation of the main provisions of the Act. This third edition is a short guide for judges, magistrates and all other judicial office-holders,

with a summary of the key points contained in the JSB's *Equal Treatment Bench Book*.

It is not intended to replace the Bench Book but to provide a quick, easily accessible and practical point of reference to complement both the Bench Book and the work done by ETAC, the JSB committee responsible for the publication of both, and for advising the JSB on judicial training in diversity and equality issues.

The updated booklet and the Bench Book can be found at *www.judiciary.gov.uk/publications-and-reports/jsb-publications/Fairness-in-Courts-and-Tribunals.htm*.

Rethinking what we're trying to achieve

Henry Brooke **believes that the tribunals judiciary should work out the best way of indicating those cases for which mediation is likely to prove a worthwhile adjunct to the tribunal process.**

The spring 2010 issue of this journal contained an interesting description of the use (or non-use) of mediation in connection with disputes between parents and local authorities over the special educational needs (or, in Scotland, the additional support needs) of their children. In 2010, the Ministry of Justice has published research studies on two alternative dispute resolution (ADR) pilot schemes in the tribunals field: an experiment with non-binding judicial early neutral evaluation in four Social Security and Child Support Tribunal areas,[1] and an experiment with judicial mediation in three Employment Tribunal centres.[2] These pilot schemes are the subject of two articles – see pages 6 and 9.

The overall message from all these reports – and from other reports on the take-up of mediation in different parts of the public law field – is that there is unquestionably a place for alternative or proportionate dispute resolution techniques, but we still have a lot to learn about the types of cases that are particularly appropriate for a mediator's skills, and about the reasons for the comparatively low take-up of mediation services.

There is now a flourishing debate about the value of neutral third party intervention . . .

Debate

There is now a flourishing debate about the value of neutral third party intervention as a way of resolving disputes more quickly, more economically, and with a far higher level of customer satisfaction. The value of mediation as a means of preventing or alleviating some of the more harmful effects of relationship breakdown in the family law field is now very well known. Alongside much greater government investment in the services of family mediators has come a far higher level of regulatory control than mediators in other fields have yet been willing to contemplate.

But as the cost of providing traditional ways of resolving disputes continues to worry the Treasury, and as customer satisfaction in the mediated resolution of their disputes continues to grow exponentially, mediation is no longer a Cinderella industry. As its popularity increases, questions are also on the increase about better ways of establishing public confidence in the quality of mediators and about the identification of those cases in which mediation, or some other form of ADR (or PDR), is most clearly a suitable option.

Urgency

I chair the Civil Mediation Council (CMC), a voluntary organisation created seven years ago to promote the use and the understanding of civil mediation. Two years ago we welcomed workplace mediators into our membership, and earlier this year we changed our constitution to enable us to play a part in promoting all forms of non-family mediation. The CMC practises an evolutionary, not a revolutionary, approach to the promotion of mediation, but outside pressures are now compelling us to examine the future development of non-family mediation with a much greater degree of urgency.

User satisfaction

In the 150 civil disputes I have mediated since my retirement from the Bench four years ago, I have witnessed again and again the user satisfaction of which I have written – and HM

Courts Service's small claims mediation service has an astonishingly high satisfaction rating. But although civil and commercial mediators have now been in business for over 20 years in the UK, there continues to be a very low level of understanding of what mediation consists of and when it could be of most value. HMCS officials now recognise that it was a mistake to withdraw the explanatory leaflets about ADR that used to populate court offices, and in the tribunals field, too, there is a belief that far more could be done to explain what mediation is and why it is so popular with most of those who use it. The fact that real-life mediations have to be conducted under conditions of complete confidentiality has always hampered attempts to bring to life what happens at a mediation, but this does not mean that the attempts should not still be made.

Comparison

In the field of civil and commercial mediation the disputants are enabled by the 'third party neutral' to understand more clearly the strengths and weaknesses of their case. They are also encouraged to compare what is on offer through the mediation process with the likely outcome if the case goes on to trial and to a necessarily imposed, and not a negotiated, solution. All too often in a civil dispute a negotiated settlement is achieved sooner or, more usually later, at far greater expense to the parties – and to the taxpayer – than was available at an early mediation.

Incentive

In a tribunal context, where the applicants or appellants do not generally incur any risk as to costs (apart from paying for their own representation, if any), the incentive to reach an agreed settlement may be much smaller. This situation will of course be different if the new Government alters the costs rules in any area of tribunal activity.

Indicators

These are some of the indicators in the field of civil mediation that suggest that mediation may well be the best way forward:

- Any case that should settle, but won't. For example, where there is some kind of obstacle to routine negotiations.
- When there are 'people issues' getting in the way. This may refer to the parties, their lawyers or both – they are all operating in an adversarial system and there are good reasons and bad why some cases get fraught. There may be an absence of rapport, mutual respect and mutual confidence. Sometimes, more simply, the parties just do not get along to such an extent that it gets in the way of business.
- In cases where there is a high degree of emotion, for example fatal injury claims or injuries involving children.
- Where an apology is important to a claimant.
- Where the parties themselves, or one of them, has a strong desire to be involved in the case.
- Where a joint settlement meeting has failed (especially if the next step is an expensive trial).
- Where one party's advisers wish to meet the other party to discuss one or more aspects of the case before completing their pre-trial risk assessment.
- Where there are cultural barriers between the parties and or their advisers, for example in a cross-jurisdiction matter, which is impeding or may impede successful negotiations.
- Where the case has particular complexities and one side just does not see where the other side is coming from ('I just don't get it!' – or 'They just don't get it!') As one of the leading American writers on negotiation, Roger Fisher, put it:

> 'Understanding the other side's thinking is not simply useful to solve the problem. It *is* the problem. The ability to see the situation as the other side sees it is one of the most important skills a negotiator can possess.'

Comparable indicators

These indicators do not necessarily apply in the tribunals field, and I was not surprised to read how increased recourse to mediation in the special educational needs field is often stymied because educational authorities cite pressure on staff time, the cost of mediation and the lack of a specialist officer to identify those cases where mediation might help the authority.

Every situation is different, there can be no fixed rules, and I believe that judges, staff and practitioners in each field of tribunal activity should work out for themselves the best way of indicating those cases (if any) for which mediation (and/or some other form of proportionate dispute resolution) is likely to prove a worthwhile adjunct to the tribunal process. And this will involve educating themselves about the achievements of mediation, as currently practised, and embarking on pilot projects of different kinds.

We are so used to the old methods that new techniques will take some time to get used to.

Training

I believe that much more needs to be done now in the area of training and in the development of specialist panels of mediators for different specialist fields. For CMC accreditation purposes, the standards continue to be:

- Mediators must have successfully completed an assessed training course.
- That course must include training in ethics, mediation theory, mediation practice, negotiation and role-play exercises.
- That course will include not less than 24 hours of tuition and role play followed by a formal assessment.
- A grasp of contract law.
- Performance assessment.

We are now conducting for the first time a review of these requirements.

Revolution

I believe that all this is simply part of a revolution in dispute resolution techniques that will continue to rumble on long after I am alive to see it. We are so used to the old methods that new techniques will take some time to get used to. As Lord Neuberger said in his powerful address to the CMC's annual conference this year:

> 'If we are to make mediation second nature, if it is to be litigation's twin, then we need to embed that culture from the very beginning of a lawyer's training. Cultures change in a number of ways. They change through training those who are already part of the culture – something which we all have experience of, having had to reorient our approach to litigation following the culture change introduced by the Woolf reforms . . . Importantly . . . , cultures change through teaching those who have not yet entered it. They change by teaching the new culture rather than the old one.'

I am therefore not surprised that the rate of voluntary recourse to mediation is still sluggish. It involves the process of rethinking what one is trying to achieve through a dispute resolution process. It is seen as involving the transfer of power from the lawyer to the mediator or (heaven forfend) to the lawyer's own client. It is perceived as a threat to traditional ways of making money and succeeding in business. But for all these real or imaginary threats it works, it pleases most of those who use it, and it should be used far more often.

Sir Henry Brooke was the first Shadow President of the Tribunals Service. After retiring from the Court of Appeal in 2006 he has become an active mediator. He currently chairs the Civil Mediation Council.

[1] *www.justice.gov.uk/publications/early-neutral-evaluation-sscs.htm*
[2] *www.justice.gov.uk/publications/judicial-mediation-research.htm*

Real-world problems

Robert Carnwath **recalls the impetus behind the growing emphasis on flexible approaches to dispute resolution in the broader administrative justice landscape.**

We in tribunals have come a long way since Sir Andrew Leggatt's 2001 Report (*Tribunals for Users: One System, One Service*) and the 2004 White Paper (*Transforming Public Services: Complaints, Redress and Tribunals*) in structural reform. However, there is still a great deal of ground to explore.

In the White Paper, the Government talked about a strategy for administrative justice which turned away from the traditional emphasis on courts, judges and court procedures and legal aid to pay for litigation and towards 'real-world problems that people face'. The White Paper also noted that what people want from dispute resolution is not a one size that fits all – they are likely to want processes that are 'quick, cheap, simple and stress-free, but they may also want it to be rigorous, authoritative and final'.

In this issue, Jeremy Bennett and David Latham describe in detail 'early neutral evaluation' and judicial mediation pilots in their respective jurisdictions in which judges were the negotiators and evaluators. I am keen that we explore the possibilities offered by proportionate dispute resolution (PDR) in its broadest sense – from Departments actively reconsidering their decisions through to early evaluation of the relative merits of an appeal. These are examples of how we can narrow areas of dispute and encourage agreement. I also believe that this is the right time for us to be looking at the balance of work between judges and administrators and whether there are opportunities for legally qualified administrators and trained mediators (whether judicial office-holders or not) to undertake some of these activities.

The current economic climate gives added impetus for us to explore flexible approaches to dispute resolution which meet the needs of the parties concerned. PDR must not be seen as separate from the traditional judicial process but an overriding objective.

Lord Justice Carnwath is the Senior President of Tribunals.

'Our strategy turns on its head the Department's traditional emphasis first on courts, judges and court procedure, and second on legal aid to pay mainly for litigation lawyers. It starts instead with the real-world problems people face. The aim is to develop a range of policies and services that, so far as possible, will help people to avoid problems and legal disputes in the first place; and where they cannot, provides tailored solutions to resolve the dispute as quickly and cost effectively as possible. It can be summed up as "Proportionate Dispute Resolution".'

(*White Paper para 2.2***)**

'It is also important to consider what people want in terms of the processes they go through. This may well involve striking a balance between competing factors. Most people seem likely to want the process to be quick, cheap, simple and stress-free, but they may also want it to be rigorous, authoritative and final. Some may prefer an informal process where the dispute is resolved consensually. For some, an important consideration may be that the proceedings remain private.'

(White Paper para 2.7)

'. . . there is a valuable role for ADR, but one which would have to be carefully considered according to the area of jurisdiction, and the needs of individual cases.'

(Leggatt Report para 8.23)

Benefits of early neutral EVALUATION

Following a successful pilot exercise to assess whether some classes of appeal might be resolved fairly without a tribunal hearing, *Jeremy Bennett* is confident that the time will come when there is a central place for alternative dispute resolution in the modern judicial system.

In the Summer 2006 issue of this journal, Michael Harris described the plans of the (then) Appeals Service to conduct a pilot exercise to try to find out whether some classes of appeal might be resolved fairly without a tribunal hearing. In that article, he described the difference between mediation in civil and family cases and his tribunal's chosen method of early neutral evaluation (ENE) – namely that the tribunal's aim was not to reach settlement, but to find the 'legally correct' answer to the dispute.

In fact, his start date for the pilot turned out to be a little optimistic, and it was not until early 2008 that the pilot got under way at four tribunal sites – Sutton, Bexleyheath, Cardiff and Bristol. It ran for a year and involved 2,000 cases.

Ambit

The benefit chosen for the pilot exercise was disability living allowance (DLA). There were three main reasons for choosing this benefit. First, DLA formed the largest part of the tribunal's work at the inception of the project. Secondly, about half of the appeals relating to that benefit were allowed by the tribunal. Thirdly, the cost of convening the three-person panels used to resolve these disputes was relatively high.

Neutral evaluation

As already mentioned, the form of alternative dispute resolution chosen was ENE and the aim of the exercise was to identify the correct level of award of benefit, rather than to negotiate a settlement or to mediate between the parties. There is no room for exercising discretion in awarding DLA; the statutory requirements have to be met for an award to be made.

ENE involves an independent person, in this case a judge, assessing the claims made by each side and giving an opinion on the likely outcome of the dispute. The expressed opinion is not binding and the parties decide whether or not to act upon it. Participation in the process requires both parties to be willing and able to give informed consent. The process adopted closely resembles the system used by the Financial Services Ombudsman, although there it is used to resolve very different types of disputes. It involves a dialogue with only one party – the one likely to lose.

Endorsement

Such a scheme cannot be imposed on parties. Before the pilot started, time was taken to explain carefully what was proposed to welfare rights organisations such as the CAB and the Disability and Carers Service, the Departmental agency responsible for making DLA decisions and administering the benefit. Both groups gave their endorsement to the scheme. This was important because the evaluation of the appeal was being undertaken by a judge alone, albeit an experienced one. In contrast, the panel is made up of three people, and also includes a doctor and a member with expertise in disability.

Appeals

Appeals against DLA decisions are lodged by appellants with the Department of Work and Pensions and not the tribunal itself. The Department prepares its response to the appeal and lodges it with the tribunal. Typically, three

months can elapse between the lodging of the appeal and the papers being lodged with the tribunal. At the time of the pilot exercise, waiting times for appeals of this kind to be heard by a tribunal were running at about 14 weeks.

Process

Under the pilot, upon registration of the appeal with the tribunal, the tribunal issued an introductory letter outlining the ENE process to the appellant – and, if known, his or her representative – and inviting them to opt into the process. The Department had committed itself to participate whenever the appellant elected to opt in.

If the appellant did agree to take part in the pilot, the judge received and previewed the appeal papers within two weeks of registration of the appeal. The judge's task was to establish whether the likely outcome of the appeal – namely, a specific award or no award – could be identified, based on the information in those papers. In cases where there was a clear outcome to the appeal, the judge spoke on the telephone to the party that would potentially lose.

The process . . . was confidential. The other party had no knowledge of contact being made with the potential losing party.

Notifiying the parties

Thus, if the judge's opinion was that the appeal was bound to succeed, the judge would contact the Department, explain what in their opinion the likely outcome of a tribunal hearing would be, and their reasons for that opinion. It was then for the Department to decide whether to revise its decision in favour of the appellant. If it did, the appeal lapsed, although the revised decision brought with it new appeal rights. These were, however, rarely exercised.

If, however, the judge's opinion was that the appeal was bound to fail and the decision under appeal would be upheld, the judge would contact the appellant or – with the appellant's approval – his or her representative. While the conversation with the Department could be conducted frankly, with technical knowledge on both sides, conversations with appellants had to be conducted with more sensitivity. Care had to be taken in explaining the likely outcome of the appeal and why it seemed bound to fail, and the judge needed to ensure that the appellant understood what was being said and did not feel imposed upon.

In these cases, various options were offered to the appellant. These could include seeking further advice or obtaining the services of a representative. The value of attending a hearing to give oral evidence was explained, as well as the possibility of withdrawing the appeal if the appellant accepted, after receiving the explanation, that it was bound to fail. Care was taken to encourage appellants to take time to consider the judge's view, and to discuss it with their representative – in cases where there was one – or family, before deciding how to act upon the advice.

Confidential

The process in either eventuality was confidential. The other party had no knowledge of contact being made with the potential losing party. Nor was the tribunal who subsequently heard any unresolved appeal made aware of contact being made with one of the parties. The judge who undertook the evaluation was excluded from any subsequent hearing.

Unclear

Where the outcome of the appeal was not clear, it automatically proceeded to a hearing. Having previewed the papers, the judge was in a position to issue case management directions to assist the tribunal hearing the case, and in this way reduced the number of hearings that needed to be adjourned by about nine per cent.

During the course of the pilot, details of all DLA cases (not just those subject to ENE) were analysed to form the basis of a quantitative evaluation of the project by a team of independent external evaluators. The evaluation team also conducted interviews with a representative selection of all those participating in the process. The official evaluation report was published in January 2010 and copies are available on the Ministry of Justice website.[1]

Outcomes

In many ways the outcome of the pilot scheme was extremely positive. Over three-quarters of appellants who were informed about the scheme agreed to take part. In about a quarter of these cases the judge was able to identify the likely outcome and contact a party. Over 20 per cent of the cases that took part in the pilot were resolved without the need for a hearing, thus avoiding a potentially stressful hearing for the appellant and allowing a decision to be reached three months earlier than would have been the case if the appeal had proceeded to a hearing. Judicial contact was slightly higher with the Department than with the appellant and their representatives.

Initial decision-makers

A particular bonus, and perhaps one we did not expect, was the willingness of the Department to take on board the judge's opinion and change their own decision. This happened in the overwhelming majority of cases where they were contacted. It is important to remember that they were under no obligation to accept the judge's view. A key factor in this may have been the arrangements (suggested incidentally by the Department itself) which meant that the judge contacted the line managers of the decision-makers, rather than the decision-makers themselves.

The judge's comments were used by Departmental managers for training decision-makers and improving performance. The Department regularly asks for greater feedback on the quality of their decision-making, and this project certainly provided it.

Another factor, and one which is easy to ignore, is the calibre of the four judges involved in the pilot. There needed to be confidence in and respect for their opinion. They needed to have the skills to quickly identify the cases where a clear outcome could be identified, and the communication skills to explain that view to the relevant party on the phone. Taking time on that aspect of the process was crucial to its success.

About five per cent of appellants withdrew their appeals as a result of contact with the judge, recognising that while they may not like the decision, it was not going to be changed on appeal – for instance, because the qualifying period had not been met.

The evaluation project showed that each of the constituent groups broadly supported the exercise and would have welcomed its extension. At a time of economic austerity, being able to demonstrate financial savings was crucial to the continuation of the scheme. These were not shown to be sufficient to warrant its immediate expansion. However, the goodwill generated by the pilot leaves those of us who were involved confident that there is a place for alternative dispute resolution in the modern judicial system, and that its time will come in the field of welfare benefits.

In the meantime, lessons have hopefully been learnt by the department about the need for a rigorous reconsideration process to ensure that unsupportable decisions are not placed before the tribunal.

Jeremy Bennett is a Regional Tribunal Judge for the SSCS South East region. This article is based on a talk given to the Senior President's Conference on 14 May 2010.

[1] *www.justice.gov.uk/publications/research.htm*

An enthusiastic response from USERS

David Latham **describes a pilot for judicial mediation within Employment Tribunals, which has since been rolled out across England and Wales – and the difficulty for judges of learning to facilitate a process and not make determinations.**

Judicial mediation is now a welcome part of the facilities for dispute resolution that may be offered to parties in Employment Tribunals in England and Wales where discrimination is an element of the claim. It has been embraced by many representatives and has had the additional support of a practice note issued by the Law Society. However, the establishment of this facility in the normal day-to-day judicial activities of the Employment Tribunal took some time to develop.

History

In 2005, Sir Goolam Meeran, the then President of the Employment Tribunals (England and Wales), persuaded the administration to test the cost and benefits of judicial mediation. It was agreed that a pilot should be conducted. Agreement was reached on the parameters of the scheme and on the protocols that should apply between the judiciary and the Advisory, Conciliation and Arbitration Service (Acas), and between the judiciary and the administration. The University of Westminster would conduct research.

It was agreed that, in appropriate cases, judicial mediation would be raised with the parties in a case management discussion (CMD) between the judge, the parties and/or their representatives. It was also recognised that judicial mediation could be used to attempt to 'unlock' a conciliation, mediation or settlement process where one or two particular areas of complexity were considered appropriate for the process.

Regions

There were three pilot regions – London Central, Birmingham and Newcastle. The main regional employment judge for each region managed the process. It was identified at an early date that judicial management was an integral part of the success of the scheme. The criteria for inclusion were that the case would not have any insolvency element or involve claims in other courts or tribunals, but would have a discrimination element and be listed for hearing for at least three days of full hearing. The rules of the Employment Tribunals were not amended to accommodate the pilot. It was agreed that the use of a CMD within the existing rules was an adequate vehicle for the process, and this remains the position in the full scheme now operating.

The pilot

The pilot operated for a year, between July 2005 and July 2006. The initial approach was made by the judge at a CMD, for appropriate cases that satisfied the criteria. The parties were asked for a response within the following seven days. Positive responses were referred to the regional employment judge who would then confirm by telephone with the parties and their representatives that they were interested in the offer of mediation, to confirm that it was a suitable case for such an approach, and to fix a date for the judicial mediation. The original CMD would have carried out its normal functions of identifying the issues, making all appropriate orders and listing the matter for full or other hearings. The process of judicial mediation would not therefore delay the ultimate resolution of the dispute if unsuccessful. The aim was for the mediation to take place within six weeks of the original CMD.

Research

The report from Westminster University was limited only to the pilot period and did not

see the growth in the take-up of the process afterwards. When the pilot period ended, there were no research results available but it was agreed that it should be continued, and it carried on in the same three regions until the end of 2008.

Internal monitoring showed a continuing increase in the take-up of the offer of mediation and a success rate in mediated cases of over 60 per cent. Mediated cases were normally concluded within one day, thus saving valuable hearing days.

Although the draft research reports were equivocal, the judiciary felt that there was enough subsequent evidence to continue with the process. A business case was put together and the administration agreed to roll out the scheme throughout England and Wales, despite the fact that the final research report from Westminster University was not available.

National roll-out

Accordingly, from January 2009 judicial mediation was available in all 12 regions. Additional training took place and included interpersonal skills and resisting attempting to make determinations. There has been a more successful take-up in some regions than in others. The final report of Westminster University was published in March 2010.[1] It was not generally supportive. However, experience subsequent to the pilot has, in the opinion of the judiciary, largely overtaken that report. This is generally supported by the reaction of parties, representatives and the Law Society in England and Wales. Current trends are showing a take-up in the first 10 months of 2010 of 370 judicial mediations, of which 243 have been successful – saving a total of 1,381 hearing days.

It is worth noting that judicial mediation was and is intended to be an additional form of dispute resolution for the parties. It is not a substitute for the role of Acas as conciliators, and does not stand in the way of private negotiated settlements. The judge has no decision-making role. There is no need for the parties to prepare outline briefs for the judge nor to make opening statements. The CMD held prior to the judicial mediation has already 'defined ' the areas of dispute.

The procedure

The process encourages good case management and requires supervision by the judge. It involves the following.

- An initial approach to the parties at the first CMD by a judge who has identified that the case satisfies the criteria.
- That CMD will have carried out its normal functions of identifying the issues, making all appropriate orders and listing the matter for full or other hearings.
- The parties respond to the approach agreeing to the process.
- Thereupon the matter is referred to the judge for further consideration as to an offer of judicial mediation.
- Any variations in orders and directions are made to accommodate the judicial mediation but the full hearing is not delayed.
- If the process is successful, the concluded outcome is recorded in a compromise agreement, an Acas settlement or a consent order.
- The entire process is held on a confidential basis and in private.
- It is imperative that the respondents have a person available at the judicial mediation with full authority to resolve the matter.
- The judicial mediation is conducted by a trained employment judge using facilitative techniques.

Lessons learnt

Lessons have included managing user awareness and expectations that have often gone beyond the criteria of the scheme itself, which generally only allow cases with an element of discrimination to be mediated. It is particularly important to ensure that a decision-maker is present on

behalf of the respondents, with an unfettered discretion to come to a conclusion, if appropriate. This has not always been the case. Where an informal process in used, such as in disability and health issues, judicial mediation is more easily managed because the particular sensitivities of the claimant, and of the parties generally, can be handled in a constructive and positive way.

Positives and negatives

Negative aspects experienced include:

- Use of the process by a party for litigation tactic purposes.
- The absence of a decision-maker for the respondent.
- Difficulties with the decision-making process of some local authority employers.
- Too many people attending who are not needed.
- The parties' wish to look at evidence.
- Lack of representatives trained in the mediation process.
- The physical constraint of premises.

These are dealt with by good management of the process by the judge.

Positive aspects experienced include:

- Self-represented parties are not at a disadvantage and can benefit from the process.
- Parties with disabilities and special needs can be more easily accommodated.
- The wider range of available outcomes.
- Realism is more easily brought to bear than at a formal hearing.
- Less stress for the parties.
- Judges as mediators are independent, have knowledge of the case, have a specialist knowledge of the law and the remedies available in tribunal, are trusted and respected, and provide a bespoke facility.

There are, however, restrictions in the use of the premises currently available, as a formal tribunal room is not an appropriate setting. What is generally required is at least three rooms, one as a general mediation room, which hopefully can be in a much more relaxed setting and atmosphere than a formal tribunal room, with break-out rooms or retiring rooms for each of the parties.

Controlling enthusiasm, particularly of representatives not necessarily versed in mediation techniques, is a skill that has had to be developed, as is the ability of the judge to spend long periods of time with very little input into the process – difficult for someone used to making judicial determinations. It has required a change in culture on the part of the judiciary, for the judicial mediators and for those conducting the CMD where the possibility of mediation is raised. There needs to be collective support for the process.

What now?

The judicial mediation process is now embedded in the Employment Tribunal system. It needs to be offered more widely, but constraints exist in terms of facilities and trained mediators. More analysis is needed of the results of the scheme. It is hoped that a more scientific basis of reporting on data and the collecting of information can be put in place which will not only assist in justifying a further expansion of the scheme but also in its development.

Judicial mediators are already expressing strong views that the techniques that are being used should be expanded and that mediation should be offered as a wider service to the public. It is believed that this is an area of judicial skills for the future of the judiciary as a whole. Alternate dispute resolution must be a way forward and judicial mediation is an important part of that.

David Latham is President of the Employment Tribunals (England and Wales).

[1] *www.adrnow.org.uk/go/SubPage_153.html.*

Change that's been a long time COMING

The Immigration and Asylum Chamber of the Upper Tribunal was established less than a year ago. *Nicholas Blake* describes the original objectives for the Chamber and how it is working.

In February 2010, the Asylum and Immigration Tribunal was abolished and two new chambers were created of the First-tier and Upper Tribunal for the determination of such appeals. In 2008–9 the AIT had determined 188,731 immigration-related appeals. Under the old system there was internal reconsideration followed by statutory review to the High Court on paper, of which there were some 26,700 applications giving rise to 6,430 orders for reconsideration. After reconsideration, further applications for permission to appeal went to the Court of Appeal.

The Administrative Court and the Court of Appeal were becoming overwhelmed with routine applications. Delays were occurring in the processing of cases in a system originally designed to speed things up. Very difficult questions of asylum law, humanitarian protection, European Union and human rights law as well as the interpretation and application of increasingly technical immigration rules were being decided under considerable pressure of time and numbers, and the resulting jurisprudence did not always command public confidence. There was a compelling case for change.

Objectives

The creation of the Immigration and Asylum Chamber of the Upper Tribunal was intended to achieve two main objectives: first, to provide a system of appeal on a point of law from the decisions of the First-tier Tribunal and, if permission to appeal was granted, to decide whether the decision should be remade. Such a system would both relieve the High Court of its reconsideration jurisdiction and reduce much of the appellate work of the Court of Appeal, which would only need to apply second appeal criteria.

Judicial review

Second, the statutory scheme was designed to enable classes of judicial review claims to be transferred either by class or case by case to the Upper Tribunal for determination. The scheme envisaged that fresh-claim judicial reviews would in due course be transferred. Instead of judges of the Administrative Court having to decide for themselves what an immigration judge might have made of the new material that the respondent did not consider materially changed the position, senior immigration judges would be able to decide the question for themselves.

Expertise

Both objectives recognised the specialist expertise that the tribunals judiciary develop as well as the other advantages of the tribunal system: lower administrative costs, less formality, speedier throughput and more flexible procedural rules. At the same time the subject matter meant that there was strong public interest in ensuring high standards of judicial scrutiny in decisions where life, limb and liberty were imperilled or well-established families faced being broken up.

Close ties

We are now nine months into the new system. How is it working out? In one respect, the answer is it is too early to say. For a number of reasons judicial reviews have not been transferred to the Upper Tribunal as early as might have been hoped and it will only be mid-2011 at the earliest when this may happen. However, the Upper Tribunal is working closely with the senior judiciary in all three national jurisdictions in which it operates to develop close ties and reciprocal benefits.

Interchange

All judges of the High Court and Court of Appeal in England and Wales and Northern Ireland can be nominated to sit in the Upper Tribunal, as may judges of the Inner and Outer House of the Court of Session in Scotland. Since April 2010, a sequence of nominated judges of the Administrative Court has been sitting in the Upper Tribunal deciding both substantive appeals and Upper Tribunal permission to appeal. A group of judges of the Outer House of the Court of Session has also been nominated to sit in the Upper Tribunal and November 2010 saw the first of them sitting in the Upper Tribunal in London. We have also benefited from a short tour by Lord Justice Sedley, whose contribution to immigration and asylum case law in the Court of Appeal of England and Wales has been immense. We hope that other Lords Justices will follow.

This interaction both gives a better understanding of how immigration judges work to the senior judiciary and transmits the senior judiciary's approach to case management, credibility of witnesses, interpretation and application of the law to the tribunal judges. It has been positive and stimulating, preparing the way for future transfer of judicial review claims and reflecting the continued active participation of the senior judiciary in immigration hearings.

Permissions to appeal

To date the senior immigration judges have determined 16,000 First-tier applications and 5,700 applications renewed to the Upper Tribunal, whose decision is final subject to the availability of judicial review. This represents an enormous task for a small judicial body. Twenty-one per cent of the First-tier applications have been granted and of the 4,000-odd second level decisions that have been determined to date 15 per cent have been granted. This suggests both a critical scrutiny and a reasonable degree of satisfaction with the first decision on permission to appeal. It remains uncertain whether the status of superior court of record assigned to the Upper Tribunal removes or very substantially restricts the ability of a dissatisfied party to judicially review a refusal of permission to appeal. There are different decisions on the point in England and Scotland. However, apart from unforeseen cases where the law develops after permission has been refused, it is hoped that any case deserving of a second look has been the subject of a grant of permission.

Substantive appeals

In addition, the new Chamber has determined 3,100 substantive appeals to the end of October 2010 on a diverse range of subject matters. It has expanded its criteria for reporting cases of interest and has adopted and developed a system of factual guidance, where all relevant objective evidence on commonly recurring points is recorded and evaluated and general conclusions reached on aspects of risk to people with particular characteristics, thus saving parties from having to reproduce that evidence in the First-tier Tribunal. By this means the Tribunal is both using its accumulated expertise and promoting the overriding objective as expressed in the Tribunal Procedure (Upper Tribunal) Rules 2008.

Stimulating

It has been a stimulating time for me as President. I have come to learn how immigration judges go about their work with industry and diligence, always alive to the mass of case law to work through and changes to be aware of. I have sat on a number of interesting appeals in London, Edinburgh and Belfast and exchanged learning on matters of common interest with asylum judges in Europe and Canada. As the great late Sam Cook told: "It's been a long time coming but I feel a change is going to come." It has been a privilege to be part of these changes and to work to achieve their aspirations and benefits.

Mr Justice Blake is President of the Immigration and Asylum Chamber of the Upper Tribunal.

The more preparation the better

Martin Williams **describes the benefits – and limitations – of pre-hearing advice and some of the misconceptions that an unrepresented party might bring to a tribunal hearing.**

Some unrepresented parties appearing before a tribunal will have had advice before the hearing, dealing with the issues in their case and what to expect at the hearing. Such preparation can vary in quality. Other unrepresented parties will have had no such advice.

In this article, I try to give an insight into the expectations that many appellants have of a hearing and to describe the benefits and limitations of pre-hearing preparation – including common misconceptions and the likely limits of a party's understanding, despite the best advice.

Pre-hearing advice

Pre-hearing preparation may assist a party to overcome some of the disadvantages of not having a representative, but it is never an adequate substitute.

Many of the things that an adviser will have covered with a party are similar to the points that a good tribunal judge will make in their introduction to the parties. However, typically, an adviser will have had more time to spend on these issues and an opportunity to build a relationship of trust. They will have been able to question the party about what they expect to happen and to bring to light misconceptions that may need to be addressed.

Independence

An adviser will have been at pains to explain that the tribunal is independent from the decision-maker whose decision is the subject of the appeal.

Where the appeal is against a decision of the state, there is often a mistaken belief that the state is somehow monolithic, and that all of its sections . . . act as one, with access to the same information.

Where the appeal is against a decision of the state, there is often a mistaken belief that the state is somehow monolithic, and that all of its sections (including the judiciary) act as one, with access to the same information. Thus, many appellants in social security appeals are surprised that the tribunal considering their entitlement to a sickness benefit has not got a full copy of their medical records. This is often particularly true where many areas of a person's life depend on state provision.

An adviser will have explained that all the tribunal will know of the individual is what is contained in the bundle, plus anything else they are given before the hearing or told by the parties. Without such advice, a party may not have provided relevant evidence to support their case.

Finding facts

In practice, independence is very difficult to explain without also explaining the role of the tribunal in finding the facts from the available evidence and applying the law to those facts to reach a decision. An adviser might explain:

> 'They are not the same as the people who said you couldn't have disability living allowance. They are not on their side, but that doesn't mean they are on your side either. They are in between you and the other side, and they have to decide who they think is right.'

That on its own means little without an explanation of how a tribunal is to decide what is right:

> 'The tribunal's job is to look at all of the evidence and decide what they believe is true based on which of that evidence they think is correct. Then, having decided what the true facts are, they decide whether that means you meet the legal rules to get the benefit.'

That may lead on to further discussion of the relevant facts, based on the requirements that needed to meet the legal tests involved.

Substance

An adviser will have tried to explain what the central issues in the case are. This necessitates explaining the law which the tribunal must consider in a way the claimant understands. A client who understands the legal test which they must satisfy in order to succeed is in a stronger position, whether talking to their adviser or giving evidence. They stand a better chance of appreciating the relevance of the question being asked and therefore a better chance of answering it in a way that will give the tribunal meaningful evidence.

. . . few parties will know of the tribunal's power to summon witnesses or order disclosure of documents.

Some tribunals seem to think that a party's evidence is more likely to be truthful where the claimant does not understand the importance of the question. Aside from being unfair, the practice of asking a claimant to answer a question whose relevance they do not understand is less likely to elicit a helpful response.

Powers

While an adviser may be able to explain that the tribunal is charged with making the decision, and a little about what it must do to reach that decision, it is very difficult to explain the powers of the tribunal in sufficient detail. Brief discussion of the format of the hearing can be helpful; for example, that there will be introductions, that the members will ask questions and that the party will have an opportunity to say what they feel is relevant.

However, it is simply not possible to prepare a client for all of the case management powers that the tribunal might exercise. For example, how can one prepare a party to know when to ask for an adjournment to consider new evidence produced by the other side just before the hearing? Many unrepresented parties will answer 'yes' when asked whether they have read the documents and be happy to proceed, although they have not had advice on their relevance to the case.

Similarly, although an adviser will do everything possible to ensure that all relevant documents are before the tribunal in advance of the hearing, where it becomes apparent in the course of the hearing that other documents might exist or could be obtained, few parties will know of the tribunal's power to summon witnesses or order disclosure of documents.

Even where the party does know enough to ask for an adjournment or a direction on further documents, understanding how that might be consistent with the overriding objective of any procedure rules will be beyond the capabilities of most unrepresented parties.

Given the fundamental difficulties that an unrepresented party has in dealing with procedural points as they arise, it is not surprising that many of the binding cases on fair hearings deal with tribunals that have failed to deal with such points.

Informality

Advisers will have tried to explain as carefully as possible that the proceedings will be informal.

This is often done by asking the party first what they think the hearing will be like. A typical discussion on this point would explain that there are no gowns or wigs, no standing up to give evidence and that it is very unlikely evidence will be given on oath.

However, the adviser will also have tried to make it clear that, though informal, ultimately the hearing is a type of legal proceeding and the tribunal judge has control of the proceedings.

Advisers should also have described the composition of the tribunal, including what is and is not included in the role of specialist members. For example, in social security cases, the party often expects the medical member of the tribunal to examine them.

The role of the representative

In a case where the adviser is attending as a representative, then they will also have explained that their role is not to give the party's evidence for them. Clients are often shocked by this and expect their representative to do all the talking. An adviser faced with this may have explained that, as the central issues are about things that have happened or apply to the party, then the tribunal wants to hear that first-hand.

The adviser will then explain that their role is to ensure that their client's evidence is as complete and relevant as possible by asking questions not asked by the tribunal, or drawing out additional points, and that they will comment on which evidence the tribunal should prefer where necessary and ensure that the tribunal understands the legal representations being made.

Written submissions

Where the adviser is not able to attend, they may send a written submission. Although that can assist a tribunal in forming a view of the issues, it cannot deal with all of the legal points that may arise at the hearing. Sometimes the relevance of the legal issues depends on the view of the facts the tribunal has taken. It is worth checking with the party that they know what is in the submissions made by their adviser. That may be a useful way to check what the party understands of their case and gain some view of how adequately the party has been prepared. The less preparation, the more the tribunal will need to enable the party to give relevant evidence, by explaining its own role and framing the legal issues in a way the party can understand.

. . . careful explanation by the tribunal of its independence and the procedure to be followed, as well as the legal tests at issue, can only add to the fairness of the proceedings.

Conclusion

While unrepresented parties may often have been prepared for what to expect at the hearing, this is not an adequate substitution for proper representation, particularly in respect of procedural rules and legal submissions, and tribunal judges will need all their skills in ensuring that evidence is relevant and the party feels they have had a fair hearing.

Furthermore, although advisers will have tried to go over the essential features of the hearing and impress on their clients the matters that are relevant to the decision, careful explanation by the tribunal of its independence and the procedure to be followed, as well as the legal tests at issue, can only add to the fairness of the proceedings.

Martin Williams is a welfare rights adviser at the Child Poverty Action Group.

Readers may wish to revisit two articles published in previous issues of the journal, and both available at *www.judiciary.gov.uk/publications-and-reports/jsb-publications/Tribunals+Journal*. They are: 'The Tribunal introduction', Mungo Deans (1998) Volume 5, issue 2; and 'Walking a tightrope: Strategies for when a party is poorly represented', Melanie Lewis (Summer 2009).

A substantial element of discretion

Mark Hinchliffe **considers guidance from the Upper Tribunal on when it is appropriate for a First-tier Tribunal to exercise its power of review under section 9 of the Tribunals, Courts and Enforcement Act 2007.**

Important issues of principle have been raised in *R (RB) v First-tier Tribunal*,[1] a mental health case heard by a three-judge panel, chaired by the Senior President of Tribunals.

Facts

The applicant (RB) was detained in a hospital as a result of criminal proceedings because he suffers from a serious mental illness. At a hearing before the First-tier Tribunal (Mental Health), RB's doctor supported a conditional discharge to enable him to move to a registered care home, provided that there were strict conditions preventing unrestricted access to the community. The First-tier Tribunal initially concluded that it could impose these conditions because, although the proposed conditions *restricted* RB's liberty, they did not *deprive* him of liberty for the purposes of Article 5 of the European Convention on Human Rights. Alternatively, RB's 'valid and meaningful consent' prevented the deprivation of liberty from being a breach of Article 5.

The reasons for [the Principal Judge of the First-tier Tribunal's] decision ran to 41 paragraphs over 13 pages.

The Secretary of State, who did not want RB to move to a care home, applied to the First-tier Tribunal for permission to appeal on a point of law. The Principal Judge of the First-tier Tribunal reviewed the decision, set it aside and directed a re-hearing by a freshly constituted panel. The reasons for his decision ran to 41 paragraphs over 13 pages. His conclusion was that the proposed restrictions *did* amount to a deprivation of liberty and were, therefore, not appropriate for a conditional discharge. Moreover, RB's consent made no difference. He was satisfied that, on the established authorities, the decision of the First-tier panel was wrong in law.

Jurisdiction

In due course, RB applied to the Upper Tribunal for permission to appeal against the decision to review and have a re-hearing. However, at that stage the Upper Tribunal had no jurisdiction because the decision to review was an 'excluded decision' under the 2007 Act. This meant that there was no direct right of appeal. However, Mr Justice Walker – President of the Administrative Appeals Chamber of the Upper Tribunal – directed that the application to the Upper Tribunal should be treated as an application for permission to apply for judicial review, which he then granted, and the case was then transferred to the Upper Tribunal for determination.

When to review

Rule 49(1) of the relevant First-tier Tribunal rules provides:

> '49—(1) The Tribunal may only undertake a review of a decision . . . if it is satisfied that there was an error of law in the decision.'

The power to review decisions is an important and valuable one – intended, among other things, to provide an alternative remedy to an appeal.

In a case where the appeal would be bound to succeed, a review enables appropriate corrective action to be taken without delay.

The Explanatory Notes to the 2007 Act state:

> 'Sections 9 and 10 provide powers for the First-tier and Upper Tribunals to review their own decisions without the need for a full onward appeal and, where the tribunal concludes that an error was made, to re-decide the matter. This is intended to capture decisions that are clearly wrong, so avoiding the need for an appeal. The power (is) a discretionary power . . . so that only appropriate decisions are reviewed. This contrasts with cases where . . . for instance, it is important to have an authoritative ruling.'

The Upper Tribunal concluded that this explanatory note provided helpful guidance as to the ambit of the power to review and if a power of review is to be exercised because the First-tier Tribunal is satisfied that there was an error of law, then this should only be done in clear cases.

Length

In R.B's case, one indication that it was *not* clear that the original decision was wrong in law was the length of the review decision. If an error of law is clear, it should be possible to give reasons in a couple of paragraphs. Often a single sentence is sufficient where, for instance, all that needs to be done is to draw attention to an overlooked authority or statutory provision or to agree with a ground of appeal. Moreover, as review decisions are appropriate only where an authoritative decision is not necessary, the reviewing judge need not routinely set out the facts or the background legislation or cite at length from authorities. There is no need for review decisions to be written in the style of decisions of the appellate courts.

Overriding objective

Where the First-tier Tribunal is satisfied as to an error of law the Upper Tribunal concluded that, in deciding what to do about it, the key question was what in all the circumstances (including the degree of delay that may arise from alternative courses of action) would best advance the overriding objective of dealing with the case fairly and justly. In R.B's case, the review was set aside and the Secretary of State was granted permission to appeal against the original decision of the First-tier Tribunal.

The substantial element of judgment or discretion in deciding whether to review, and what action to take, is no doubt a reason for review decisions not being appealable direct to the Upper Tribunal

Discretion

The Upper Tribunal accepted that the decision to be made upon an application for permission to appeal inevitably involved a large element of judgement or discretion. Indeed, even if the First-tier Tribunal is satisfied that there is a clear error of law, it may nevertheless decide not to review a decision but might instead give permission to appeal. For example, the error may be a common one and, for that reason, it may be helpful to have an authoritative decision from the Upper Tribunal. The substantial element of judgement or discretion in deciding whether to review, and what action to take, is no doubt a reason for review decisions not being appealable direct to the Upper Tribunal. It is, perhaps, also a reason for expecting that the Upper Tribunal will seldom interfere with review decisions when, exceptionally, judicial review proceedings against a decision to review are brought.

Mark Hinchliffe is Deputy Chamber President, First-tier Tribunal (Mental Health).

[1] [2010] UKUT 160 (AAC).

A LEGACY OF FAIR PRINCIPLES

Richard Thomas **hopes that the abolition of the AJTC does not mean that vulnerable users go unprotected.**

The coalition government is taking many tough decisions, but it is welcome that so much emphasis is being placed on fairness. Fairness lies at the heart of accessible means for citizens to put right the state's mistakes.

The Administrative Justice and Tribunals Council (AJTC) is saddened and disappointed with the Government's plans to abolish the council as part of the review of 'arm's length bodies'. However, we acknowledge that these matters are for Ministers and Parliament. Rather than engage with that debate, it is business as usual for now and I wish to highlight some of the challenges currently faced by the administrative justice system. More than ever, it is necessary to ensure that the foundational principles of the Franks Report – 'openness, fairness and impartiality' – are promoted and maintained.

Current challenges

The administrative justice system is experiencing unprecedented pressures. Case volumes have reached record levels, with 793,900 cases received by the Tribunals Service in 2009–2010 – a 26 per cent increase on the previous year. This will pass the one million mark in the current year. However, this is just the tip of the iceberg – behind these must be many more people aggrieved by an official decision who do not pursue an appeal.

The high success rates before many appeals suggest that too many public bodies are 'getting it wrong first time'. A priority must be to ensure that public services do more to get it 'right first time', AJTC's *cri de coeur.* No one wants to bring an appeal, and reducing the demand brings obvious savings and advantages to citizen and taxpayer.

Reforms to social security, school admissions and elsewhere are, however, likely to increase both complexities and volumes. And the plan to integrate tribunals with the ordinary courts brings risks of increased legalism and reduced accessibility, informality and expert knowledge. The introduction of fees in tribunals has the potential to be a very real barrier to justice, which would be even more controversial if fees are not refunded to successful appellants.

The issues decided by tribunals frequently affect livelihoods, incomes, homes and even liberty. Yet it can seem like David and Goliath to those in dispute with the state, who are typically isolated and unrepresented individuals up against a powerful 'repeat player' opponent familiar with the complex territory. Recently announced cuts to public services, legal aid and advice services will only serve to exacerbate the challenges.

The end-to-end perspective

Administrative justice is organised along jurisdictional lines and there are few able to offer a system-wide perspective. A holistic approach to administrative justice is needed to ensure tribunals continue as a success story within the wider landscape and to secure cross-cutting initiatives such as 'Right First Time'. Given that one of AJTC's key aims has been to address the Cinderella status of administrative justice, we are concerned that administrative justice scarcely features in the MoJ's Business Plan for 2011–15.

Innovatory approaches to dispute resolution

The AJTC has been a consistent champion of alternative and proportionate dispute resolution. Ever-increasing volumes mean that new and credible thinking is required about the techniques for resolving disputes. Concrete action is urgently needed to bring innovatory approaches to dispute resolution with lower unit costs and higher user satisfaction.

Representing the user perspective

Perhaps the most significant contribution of the AJTC has been in its role as the voice of the user.

The need for a user-friendly, informal approach in tribunals was one of the foundations of the Leggatt Report.

In the context of the many challenges facing the system, it is crucial that the user perspective is not lost. The AJTC's recently published *Principles for Administrative Justice* is instructive and – if taken seriously – may serve as one of its main legacies.

- Make users and their needs central, treating them with fairness and respect at all times
- Enable people to challenge decisions and seek redress using procedures that are independent, open and appropriate for the matter involved.
- Keep people fully informed and empower them to resolve their problems as quickly and comprehensively as possible.
- Lead to well-reasoned, lawful and timely outcomes.
- Be coherent and consistent.
- Work proportionately and efficiently.
- Adopt the highest standards of behaviour, seek to learn from experience and continuously improve.

Even (especially) in the absence of the AJTC, the system needs to assess itself – and be assessed – against these standards. Ensuring that the needs of the most vulnerable in our society are protected is an imperative if fairness and justice are to be sustained in these challenging times.

Richard Thomas CBE is Chairman of the Administrative Justice and Tribunals Council.

Different approaches to ADR

This extract from para 2.11 of the White Paper *Transforming Public Services: Complaints, Redress and Tribunals* 2004 is a useful glossary for some of the terms used when discussing different forms of alternative dispute resolution (ADR).

- *Adjudication* **involves an impartial, independent third party hearing the claims of both sides and issuing a decision to resolve the dispute. The outcome is determined by the adjudicator, not by the parties. Determinations are usually made on the basis of fairness, and the process used and means of decision-making are not bound by law.**
- *Arbitration* **involves an impartial, independent third party hearing the claims of both sides and issuing a binding decision to resolve the dispute. The outcome is determined by the arbitrator, is final and legally binding, with limited grounds for appeal. It requires both parties' willing and informed consent to participate.**
- *Conciliation* **involves an impartial third party helping the parties to resolve their dispute by hearing both sides and offering an opinion on settlement. It requires both parties' willing and informed consent to participate. The parties determine the outcome, usually with advice from the conciliator. An example is Acas conciliation where early neutral evaluation involves an independent person assessing the claims made by each side and giving an opinion on a) the likely outcome in court or tribunal, b) a fair outcome, and/or c) a technical or legal point. It is non-binding and the parties decide how to use the opinion in their negotiations. It requires both parties' willing and informed consent to participate. It can be useful to help moderate a party's unrealistic claims.**
- *Mediation* **involves an independent third party helping parties to reach a voluntary, mutually agreed resolution. A key principle is that the parties, not the mediator, decide the outcome. It requires both parties' willing and informed consent to participate. It requires mediating skills and it has a structured format.**
- *Negotiation* **involves dealing directly with the person or the organisation in dispute. It is non-binding and can be done by the person in dispute or by a representative ('assisted negotiation'). The negotiator is not impartial but instead represents a party's interests. An example of negotiation is settlement discussions between solicitors.**

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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