JUDICIAL COLLEGE

TRIBUNALS

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WINTER 2012

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Welcome to the winter 2012 issue of the journal – and a selection of articles that demonstrates the wide variety of work undertaken by tribunals. On page 2, our new Senior President of Tribunals, Sir Jeremy Sullivan, describes his plan to lead tribunals into a period of stability and consolidation, and ways in which tribunals can continue to look intelligently at what we do and how we do it.

The journal continues to support the work of tribunals outside the HMCTS structure and to take their concerns into account, and this is reflected in David Bleiman's article on page 8 on the role of the interim orders jurisdiction in professional fitness-to-practise adjudication, and the challenges of conducting a fair hearing that is itself a form of risk management.

Tribunals judges and members are of course only human – and capable of making mistakes. On page 5, Nick Warren asks why we find this so hard to admit – and the options open to judges when they have second thoughts about a decision.

We include two pieces on the wider work of the Judicial Office – on a new consistent method of evaluating judicial training (see page 13) and a new Equality and Diversity Policy (see page 17).

Finally, I would encourage our readers to consider applying to become a member of our editorial board (see below) and to apply for a ticket to one in a new series of lectures by the Judicial College (see page 16).

Professor Jeremy Cooper

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Editorial Board members

Applications are invited for membership of the editorial board for the Judicial College's *Tribunals* journal. Three issues of the journal are published each year, with the aim of providing interesting, lively and informative analysis of the reforms currently under way in different areas of administrative justice.

The main role of the editorial board is to agree the contents of each issue of the journal, commission articles from prospective authors and on occasion write pieces themselves.

Successful candidates will be able to demonstrate:

- **An understanding of the needs and concerns of those appearing in front of tribunal hearings.**
- **The ability to contribute their own thoughts and experiences, with the aim of benefiting others.**
- **Good communication and interpersonal skills.**

In addition, some writing experience would be desirable.

Members of the editorial board are asked to attend three meetings a year at the Judicial College's London office.

The closing date for this post is 15 February 2013.

An application form is available from *jcpublications@judiciary.gsi.gov.uk*.

Innovation to continue in second act

Sir Jeremy Sullivan **is the second judge to hold the post of Senior President of Tribunals. He hopes to lead tribunals into a period of stability – but stability is not to be confused with stagnation, he warns.**

The time of major change and upheaval for tribunals is now over, and the next several years will be a time for consolidation. As the second judge to hold the position of Senior President of Tribunals, it will be my role to lead tribunals as we enter into a new phase – allowing what is still a new structure to bed down, mature and stabilise after a decade of creation and growth.

Transformation

The system within which we are now working is one that has been transformed over the course of 10 years. This transformation was possible largely due to the enthusiasm for change within the tribunals world, and the willingness of judges and members to be accommodating and versatile.

Central also to this process of change was the clear vision and guidance of Robert Carnwath, an inspirational first Senior President who laid the foundations for the leadership of the new unified system. Indeed, the system now operates so well, under the leadership of individual Presidents, that one of my challenges will be to tread a careful line between leadership and interference.

Flexible

During his period of office, Robert oversaw the introduction of 10 Chambers into the new structure and put the planning in place for the introduction of the Property, Land and Housing Chamber in 2013. That structure has already been flexible enough to accommodate jurisdictions as they come along – some new, some already in existence – such as appeals relating to primary health lists, care standards, MPs' expenses and environment.

Tribunals are particularly affected by government policy; a new system for assessing disability or new immigration rules inevitably means an increase in the number of appeals. The numbers back up this story. The then Tribunals Service received 640,000 appeals in 2007–8; 739,000 were received in 2011–12 and we are forecast to reach 881,100 in 2012–13. Of this last figure, the largest number is in the area of social security and child support at 483,400 appeals; employment at 204,600 and immigration and asylum at 123,100. The number of appeals within the mental health jurisdiction also continues to grow.

There remain a number of challenges that are likely to loom large over the coming months.

Case management

There remain a number of challenges that are likely to loom large over the coming months. The first will be the need to continue to dispense justice effectively within challenging budgets. This is not just something for administrators and budget holders – tribunal judges and members also have an important part to play in ensuring that they use the procedural rules available to them to ensure that cases are dealt with economically and efficiently. This not only includes more active case management, and identifying potential problems in an attempt to avoid delays, but also being alert to the ways in which technology can be used to improve the service for users, such as in video and telephone hearings.

Technology

For example the office of Employment Tribunals in Aberdeen covers a vast landmass with a good deal of oil industry-related work. Witnesses and parties can often be based abroad or located on rigs, so that travelling to the Employment Tribunal office in Aberdeen is difficult and time-consuming. To help with this, video conferencing facilities are being installed in January 2013. Evening sittings in Glasgow between 5.30 pm and 7.30 pm on two evenings a week already free up the day list for longer, more complex cases and are popular with parties, who do not need to take time away from their workplace during the day to attend a hearing.

Registrars

We should all also be willing to consider whether some functions might usefully be delegated to staff or registrars (under judicial direction) to deal with more routine matters, freeing up tribunal judges to deal with the more complex or significant cases. In a recent article in this journal, Edward Jacobs listed the functions delegated to registrars in the Administrative Appeals Chamber of the Upper Tribunal as encompassing such interlocutory powers as 'general case management powers . . . ; dealing with irregularities; striking out and reinstating proceedings; substituting or adding parties; prohibiting disclosure or publication of documents and information; giving directions and consenting to the withdrawal of a case or its reinstatement'. These arrangements already exist in special educational needs and social security cases, and are likely to be extended to mental health cases and the General Regulatory Chamber.

Proportionate dispute resolution

We should also continue to be aware of the circumstances in which PDR can reduce the number of costly hearings and the number of cases coming to full hearing. Mediation is already used within the Residential Property Tribunal Service, where the landlord and leaseholder have a relationship that will continue long after the tribunal has adjudicated on the dispute and who may therefore be open to the idea of mediation. The results of the directed mediation information sessions in special educational needs cases have been promising, and have lifted rates of mediation to 25% in some pilot areas. Judicial mediation in Employment Tribunals has led to settlements in around 70% of cases referred across England and Wales and Scotland.

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Options

Finally, as judges, we must strive to understand what users want – and help them to understand the options open to them so they can make the best choices for their own set of circumstances. Many tribunal jurisdictions are already well used to self-representing litigants but the changes to legal aid mean we must also accommodate the ever-increasing numbers who have not had the benefit of legal help in preparing their appeal. Often, this is a simple matter of making clearly expressed information and guidance readily accessible.

Diverse

Tribunal judges and members are a pretty diverse bunch. Of 5,400 fee paid judges and members and about 500 salaried, over 40% are women and over 10% from black or minority ethnic backgrounds. Within tribunal judges alone, solicitors outnumber barristers by around 2 to 1 and overall nearly 40% are women and 9% from BME.

Why is this? Probably in part because tribunals are a slightly less daunting first step into a judicial role – and a fee-paid tribunal appointment is an attractive judicial office to hold. Judges can

restrict themselves to one or a small number of jurisdictions, or alternatively take opportunities to broaden their judicial scope. The flexibility of a fee-paid appointment allows judges to get a real taste of judging while combining it with their practice or caring responsibilities, and the work offers the opportunity to sit with expert panel members in other fields, such as doctors and surveyors.

Career development

One piece of good news for tribunals, in the current climate, is the work being done on increasing diversity and career mobility for judges, and I look forward to seeing the measures contained in the Crime and Courts Bill on the statute book which will allow tribunals judges to be deployed across to sit in courts, in the same way as courts judges can already be deployed to sit on tribunals. This will allow tribunals judges to widen their field of experience even further.

Concerns

It is not all rosy, however, and an important part of my new role is to understand the current concerns of judges and members. There is no doubt that there is a lot of concern about the Government's present proposals for judicial pensions, with interest currently focusing on the eventual outcomes of the Supreme Court in *O'Brien v Ministry of Justice* on whether fee-paid judges – in that case a recorder – should be granted retrospective admission into the judicial pension scheme as well as concerns about judicial pension arrangements more broadly.

What does that mean for tribunals?

As well as looking intelligently at what we do and how we do it – and making sure that new processes for case management do not introduce unnecessary work but focus on improving the service for users – there are some areas on which we should focus. I have already mentioned the use, where suitable, of registrars and of alternative methods of dispute resolution. We must continue to work on feedback to original decision-makers in government departments to encourage them to improve their explanations of initial decisions and getting them right first time. Earlier this year, the Social Entitlement Chamber of the First-tier Tribunal, for example, introduced a standardised method of providing feedback to the Department for Work and Pensions after a decision has been overturned.

We need to give better explanations of the options open to someone in dispute and what each might entail. There are already videos of 'typical' tribunal hearings for some jurisdictions on the Internet which give users (who will usually only use a tribunal once) an idea of what to expect. As judges and members, we should never underestimate how intimidating our 'informal' hearing is to some of our users.

We should be prepared to look at different panel constitution – for example whether two (one judge and one member) rather than three-person panels might allow more opportunity to fit the specialism of the non-legal member to the case in hand.

Finally, we need to maintain strong leadership teams at the head of different Chambers and through their regional structures. Leadership is not an 'add on' to the day job but an integral part of an effective and efficient justice system. Training in leadership skills is invaluable and I am very pleased to see the Judicial College's work in this area and to give it my personal support.

Conclusion

We have come a long way in a short time since the Tribunals Courts and Enforcement Act gained Royal Assent in 2007. Now is the time to let that structure settle and consolidate itself – but let us not confuse stability with stagnation. There is a good deal of innovation going on – building opportunites for our judges and members but, above all, making sure we really are 'Tribunals for Users'.

Second thoughts are not always BETTER

Nick Warren **wonders why it is so hard for judges to admit that they sometimes make mistakes – and suggests what a judge might do in those circumstances.**

I have attended a few induction courses in the past which, in retrospect, seem to have been no more than an opportunity for some senior judges to show off a bit and to point out that the job was simply impossible. The new judges must have travelled home in gloom.

I am glad to say that it is different now. Those who organise courses for the Judicial College know that the participants have been appointed to their judicial role amid fierce competition. The tribunals themselves are confident that they will be able to do the job well, and the course must pass on that confidence to the new recruits so that they can walk away with a spring in their step. But there is also something to be said – later on perhaps - for reflecting on the things that will go wrong, and to have the confidence to deal with that as well.

Being human

All judges make mistakes. It seems slightly odd that one should have to emphasise this; we are all human after all. Perhaps it is because the job is sometimes a lonely one so the burden feels heavy. Perhaps some colleagues, coming from a competitive professional background, do not have that attractive quality of readily admitting their own mistakes to their colleagues.

Sometimes, we may identify too much with our decisions. They are final; binding; of legal force; not to be argued with. It may be an occupational hazard to identify oneself too personally with these characteristics of our decisions.

Humility

I recall as a young boy my dad telling me that in his working life in the glass industry he tried to ensure that he got at least 51 per cent of his decisions right because if he fell short of that they could replace him by tossing a coin. The point is not frivolous. Other occupations probably have a much readier acceptance of error and I find it helpful to reflect on this.

Our main job is to give a decision. We make no promise to tribunal users that we will always get it right. It is a curiosity that humility doesn't find its way into any of those lists of competencies for appointment or appraisal.

In truth, a busy judge probably makes at least half a dozen mistakes of fact a week not to mention the occasions when he or she gets the decision right but makes mistakes in the way tribunal users are treated. Our main job is to give a decision. We make no promise to tribunal users that we will always get it right. It is a curiosity that humility doesn't find its way into any of those lists of competencies for appointment or appraisal.

Prepare

Of course, good practice will reduce the number of mistakes that you make, and in particular preparing carefully and checking out the conflicts of fact in the evidence.

Leave the right-hand page of your notebook blank so that your preparation notes can structure your deliberations and you can put a brief note of your reasoning on the right-hand side.

Take a break

At the hearing it is important to take your time rather than to do anything in a fluster. This won't add more than 10 minutes or so to the day. Take a break if need be. This is always worth doing if anyone at the hearing is becoming a little distraught. If at the end of a busy day you feel disappointed with the way things have gone, consider whether there is a lesson to be learned.

For example, one thing I feel is particularly difficult is to be courteous to an advocate who is putting a very bad case. Given the chance to pause and think, I realise that if it is obvious to me that the case is a bad one, I ought at least to consider the possibility that the same idea has occurred to the advocate– and that they are simply trying to make the best of a bad job. Sometimes it helps to write these lessons down just to get it out of your system.

Guidance

Similarly, impromptu judgments are really impressive, but there is no point in making things unnecessarily hard for yourself. Take the time you need.

One good thing about the new tribunal system is that almost all of us now have a supervising judge. Asking them for help or guidance is a sign of strength, not weakness. In my experience, such judges are often flattered to be asked and a five-minute telephone chat with one of them can save you an hour or two of anxiety.

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Apologise

Sometimes in the course of a hearing there is an incident which you think may give rise to a complaint. If you recognise that you have done something wrong, then don't hesitate to apologise – and make a record in your notebook that you have done so. You can also apologise if things go wrong which are strictly outside your control. I should like to see more apologies given in case management when the 'directions' which we are so keen to issue prove burdensome or wide of the mark.

Should you expect a complaint from a tribunal user, take an early opportunity of agreeing with your colleagues (if you are sitting as a panel), or with the clerk, an account of what happened and insert that into your notebook. If you are asked to respond to a complaint then the contemporaneous record may be important.

Delay

Some people say that they welcome complaints as well as adverse criticism at appraisals as an opportunity for self-improvement. For myself, I am not so thick-skinned. One thing I have learnt, though, is the importance of avoiding a partisan tone when you respond. This advice also holds good when dealing with an application for permission to appeal from a dissatisfied tribunal user. A common cause for complaint is delay in writing up a decision.

Written judgments

Different systems for writing up decisions operate in different chambers. Sometimes a statement of reasons is given only on request. In those circumstances, the kind of preparation and noting of deliberations which I have described should help you to have a framework ready for your statement of reasons. In other jurisdictions, often involving longer cases, a written judgment is required in every case. Here, it makes sense for you to record your preparation in a narrative

note. This will also greatly assist your members in their own preparation for the case.

Set out the background and agreed facts; refer to the law which governs the case; and pose the questions which the tribunal is likely to have to answer. Your tribunal hearing will be more focused and your narrative note will be a good start for the full tribunal decision.

Slightly different considerations may apply in the Upper Tribunal. Reflection may be needed if a particular decision will have consequences for other cases.

Change of mind

Of course, some delays are caused by that sinking feeling, every time you revisit the papers, that you got the decision wrong. If you've already announced your decision – or in the course of a long hearing have announced findings of fact from which you now want to resile, there is really not much you can do except plough on.

In *Re L-B* [2012] EWCA Civ 984, the Court of Appeal offered an even more restrictive view of the judge's power to change his or her mind than had previously been permitted. The case involved public law family proceedings which are dealt with in two stages. The judge had changed her mind about her conclusion at the fact-finding stage.

Sir Stephen Sedley commented:

> 'There can be few judges who have not worried about their more difficult decisions and sometimes have come to think that there was a better and different answer. But this by itself is not an objective reason why their original judgment should not have been right. Hence the need for some exceptional circumstance – something more than a change in the judge's mind – to justify reversal of a judgment.'

A material change of circumstances or the emergence of compelling new evidence were examples cited.

Second thoughts

Sir Stephen Sedley's words, combined with the notion that it's your job to issue a decision, might spur you on to deliver your judgment and avoid delay. If the parties have received no hint of the eventual outcome then you are of course free to change your mind or discuss matters with your fellow members which you didn't cover in your deliberations.

In every Crown Court trial the judge warns the jury that it will be ever so tempting for them to conclude that there is just one vital extra piece of evidence they need which will resolve all their difficulties. The judge tells them to put that thought out of their heads. There will be no more evidence.

However, unless you have actually applied the wrong law, I would think twice about sowing seeds of doubt. In every Crown Court trial the judge warns the jury that it will be ever so tempting for them to conclude that there is just one vital extra piece of evidence they need which will resolve all their difficulties. The judge tells them to put that thought out of their heads. There will be no more evidence. They must decide the case on what they have read, seen and heard and on the common sense conclusions they can draw from what they have read seen and heard.

Sir Stephen Sedley is right. Just because thoughts are second thoughts, doesn't mean that they are more accurate than your first ones. It is better to deliver the goods on time.

Judge Nick Warren is President of the General Regulatory Chamber of the First-tier Tribunal.

When the public needs urgent PROTECTION

David Bleiman **describes the role of the interim orders jurisdiction in professional fitness-to-practise adjudication – and the challenges of conducting a fair hearing that is itself a form of risk management.**

Every profession worthy of the name has established standards of performance and conduct, along with fitness-to-practise procedures to deal with members alleged to be unfit to practise. High-profile cases include GPs or nurses struck off their professional register for the abuse or neglect of patients. Dr Harold Shipman, struck off by the General Medical Council (GMC) after his conviction for the multiple murders of his patients, was an extreme example. But the same need to protect the public against the harm which may arise from incompetence, misconduct or incapacity, arises across the range of professions from accountancy to teaching. The health regulators, between them, regulate 31 different professions comprising 1.4 million registrants. The Nursing and Midwifery Council (NMC) alone has more than 660,000.

Some cases turn on points peculiar to the regulator concerned, but many are applicable across the board.

An expanding territory

A fast-expanding territory within this jurisdiction concerns 'interim orders' (sometimes called temporary restrictions). Substantive cases take months, sometimes years, going through screening, investigation and adjudication before reaching a final decision. Consequently, there is a need for much earlier consideration of cases in which the public may be in real and present danger. Regulators' powers to impose interim orders are therefore in the front line of public protection. Action may be taken within days or weeks. The capacity to move fast and heightened awareness of risk has led to a dramatic expansion. For example, the GMC imposed only four interim orders between 1980 and 1996, compared with 455 in 2009 alone.[1]

Is it necessary?

The panel considering an interim order is not charged with determining whether the allegations are true. In most cases the criterion for an order is whether it is necessary to protect the public. Some regulators can also impose an interim order if it is otherwise in the public interest (to uphold professional standards and public confidence) or is in the interests of the registrant concerned.[2] Panels may either impose conditions of practice (such as training or supervision) or may temporarily suspend the registrant (subject to regular review). There is a right of appeal, usually to the High Court in England and Wales, the High Court in Northern Ireland or the Court of Session in Scotland.

Case law

A substantial body of case law has thus arisen. Some cases turn on points peculiar to the regulator concerned, but many are applicable across the board. The ways in which case law may bind the regulators are threefold. First, regulators may amend their rules to avoid future appeals or judicial review. Second, the guidance issued to panel members takes account of the leading authorities. Third – and perhaps most powerfully – panels sit with independent legal assessors. One regulator issues panellists with a booklet of '104 cases you must know'! Here I can only give a taster of this contested territory. It should not be taken as an authoritative summary of the law.

Procedural fairness

So what has all this to do with tribunals? The regulators' duty to protect the public must be balanced with ensuring fairness to the registrant. Invariably, this requires a panel hearing. Proportionality is crucial. The panel must consider the impact of an order on the registrant (loss of career, money, reputation) and satisfy themselves that these consequences are not disproportionate to the risk from which they seek to protect the public.[3]

Consultation

But what standards of procedural fairness are required? This question is brought into sharp focus by the recent Joint Law Commissions' consultation on the future regulation of healthcare professionals.[4] This may lead to common legislative standards for healthcare regulators and have a wider influence. The consultation reviews the way in which longstanding common law requirements of natural justice have been supplemented by the incorporation into domestic law of Article 6 of the European Convention on Human Rights with which the regulators, as public authorities, must comply. Article 6 provides that 'everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law'.

Article 6

It must first be shown that Article 6 is engaged. The principal test of whether a particular fitness-to-practise hearing involves a determination of a person's civil rights and obligations is whether the outcome is capable of affecting a practitioner's ability to continue working in their chosen profession. Accordingly, the applicability of Article 6 varies through the stages of the process. It does not apply to screening and investigation but will be engaged at the adjudication stage. This includes interim order proceedings which may result in an interim suspension.[5]

The right of registrants to achieve Article 6 rights by appeal to the higher courts means that fitness-to-practise hearings will not generally fail the Article 6 test. Procedures have improved in recent years and, arguably, are Article 6-compliant even without relying on recourse to the courts. Nonetheless, the Law Commissions think it best that the regulators be required by statute to ensure that they establish a structure which is compliant with Article 6 without taking into account the role of the higher courts.

Mix

We thus have thousands of panel members hearing professional fitness-to-practise cases in a 'tribunal'. Panels comprise a mix of registrants from the profession concerned together with lay members. Many also serve as judicial office-holders of HMCTS. The judgecraft skills required are broadly the same.

The urgency with which hearings are convened means that the accused registrant is often absent.

I now turn to just a few of the difficult issues arising in interim order hearings.

Service, notice

The urgency with which hearings are convened means that the accused registrant is often absent. Panels must consider service and reasonableness of notice and whether to proceed with a hearing in the absence of the registrant. Service is usually a technical matter. Reasonable notice requires deeper consideration. It may be much shorter than would be expected for a substantive hearing as there may be urgent risks to the public. Some regulators, including the GMC, have moved to a standard minimum seven-day notice period for interim order hearings.

Right to attend

When considering whether to proceed in the absence of the registrant, panels are often referred to guidance given by Lord Bingham cited with approval in the House of Lords case of *R v Jones*.[6]

This guidance was held to be applicable to professional regulatory proceedings in the case of *Tait*.[7] Lord Bingham said: 'The discretion to commence a trial in the absence of a defendant should be exercised with the utmost care and caution.' So far, so good. However, *R v Jones* was a criminal trial and *Tait* was about a substantive, not an interim, orders hearing. Thus, while Lord Bingham's list of 10 factors to be carefully weighed remains helpful, it is likely that at an interim order hearing 'the general public interest that a trial should take place within a reasonable time' may carry considerable weight, where it is alleged that the public is at risk.

Balance

The balancing exercise in deciding whether to proceed in the absence of the registrant is often onerous because there is so much at stake on both sides of the equation. On the one hand, a public which may be at risk of real harm. On the other, the potential that if the hearing proceeds, the registrant may entirely lose the right to practise their chosen profession, albeit temporarily.

It is often difficult for a registrant to understand the distinctive functions of the interim order hearing.

No determination of facts

The substantive hearing of a case decides whether the allegations are proved and, if so, whether these amount to a current impairment of fitness to practise. In contrast, an interim order hearing cannot determine disputed facts nor whether the registrant is fit to practise. It is an urgent precautionary exercise, a form of risk management.

There will be factual information placed before the panel. The panel does need to be satisfied that the allegations are not frivolous or misconceived and pay some attention to the quality of evidence against the registrant.

It is often difficult for a registrant to understand the distinctive functions of the interim order hearing. An unrepresented registrant, having heard the case presenter set out the allegations, may embark on a detailed point-by-point rebuttal which, as the panel has no remit to determine the facts in dispute, is unlikely to be of any benefit.

Assessment

A panel chair may ensure both fairness and relevance by patiently explaining that the panel is concerned primarily with anything which can help in the assessment of current and ongoing risk. This might include references, evidence of remedial training or up-to-date medical reports. Reflection about the circumstances giving rise to the referral may give the panel assurance that the registrant has developed strategies for handling such problems more appropriately in the future. Any information about the financial or professional impact of an interim order will also be taken into account.

Inquisitorial

Risk assessment and the formulation of adequate, proportionate and practicable conditions of practice are inherently problem-solving processes which lend themselves to an inquisitorial approach. Yet the governing procedures generally set up interim order hearings in an adversarial format, with the regulator's case presenter on one side and the accused registrant on the other.

The panel chair can make an enormous difference to the experience of the registrant and indeed, through helping the registrant to understand and feel comfortable with the hearing, can make the whole process more effective. Ultimately, the panel has the power to impose an order upon the registrant. But the quality of that decision is likely to be better where the registrant has been enabled to play a full, relevant and constructive part in the proceedings.

Paramount duty

Most regulators already have, under statute, a main duty to protect the public.[8] But, as the Law Commissions identify, the precise wording varies and public protection is not mentioned at all as the main duty of several regulators.[9] They suggest that the statute should set out a paramount duty for all healthcare regulators. The alternative formulations canvassed focus primarily on protection of the public. The term paramount duty is used to clarify that, unlike main duty, this would always prevail over any conflicting duty.

Overriding objective

However, the Law Commissions propose that the overriding objective of the Civil Procedure Rules – that cases must be dealt with justly – should be made part of the regulators' fitness-to-practise procedures. Tribunal members will be familiar with the overriding objective and recognise how helpful it can be in dealing with cases fairly and proportionately. Some, though not all, regulators already build the overriding objective into their procedures.[10]

Tension

So what happens if a paramount duty bumps into an overriding objective on the day of a hearing? Here, in a nutshell, we see the tension between public protection and fairness to the professional. A statute placing both duties on the regulators could leave scope for confusion. This could be resolved by applying the paramount duty to the regulator (the prosecutor in fitness-to-practise cases), while the overriding objective governs the independent panels which hear these cases. As explained above, at interim order hearings, the need to protect the public will weigh heavily with any panel. Nonetheless, they must engage in a balancing exercise and the interests of the registrant are not weightless. Proportionality is crucial. The overriding objective embodies a number of ingredients of dealing with a case justly and thereby supports the difficult and delicate balancing exercise which every panel must undertake.

Separation of powers

So what is the future for interim order panels? In an earlier article in this journal, Walter Merricks, chair of the Office of the Health Professions Adjudicator (OHPA), now abolished, outlined the role which had previously been envisaged for OHPA in taking over healthcare professional adjudication. He explained how the GMC had adopted much of the thinking of OHPA in its decision to establish an independent adjudication arm, the new Medical Practitioners Tribunal Service (MPTS).[11]

Here, in a nutshell, we see the tension between public protection and fairness to the professional.

The MPTS is now up and running under the experienced judicial leadership of His Honour David Pearl. This model is the high-water mark of separation of powers, with the adjudication function highly independent of the policy-making, investigation and prosecutorial role of the GMC as regulator.

Analogous jurisdictions

The Joint Law Commissions discuss options for the future of fitness-to-practise adjudication, including transferring this work to the unified HMCTS tribunals system. There are already analogous jurisdictions within HMCTS, including the First-tier Tribunal (Primary Health Lists) which deals with appeals by GPs, dentists and others against Primary Care Trusts' decisions about local performers' lists (which often include fitness-to-practise issues) and the First-tier Tribunal (Care Standards) which deals with appeals from people included in lists of individuals regarded as unsuitable to work with children and vulnerable adults. The Law Commissions ask whether the statute should leave this door open, noting that the Government has already indicated that transfer to HMCTS won't happen as this would be 'a

complicated and lengthy process to set up and the new arrangements would take a number of years to establish'.[12]

Independence

One thing is clear. Interim orders will continue to require adjudication by independent panels. The Law Commissions consider that 'the importance of interim orders and their significant impact potentially on a professional's ability to practise' is such that 'the statute should require the regulators to set up a formal panel hearing of at least three people for interim order hearings'. In addition: 'Interim order panels must be appointed by a body which is separate to the Councils.'

In future, regulators might economise on the growing costs of the fitness-to-practise function by taking screening and investigation in-house. But, as the Law Commissions identify, interim orders adjudication, which engages Article 6 rights, must remain with adjudication panels. Most such panels may not, at least in the short term, be provided with the full trappings of judicial leadership and the 'Tribunal' title adopted by the MPTS. But panels are likely to become more, rather than less, like tribunals. The work of interim order panels across different professions is already very similar. A unifying healthcare professional regulation Act would establish a largely common framework. There may be economies of scale in harnessing the expertise of panellists by establishing common pools of panellists or collaboration in training and professional development.

. . . panels are likely to become more, rather than less, like tribunals.

Meanwhile, panellists can independently learn from each other's experience. Those who also serve in HMCTS will find the judgecraft skills learned and exercised in tribunals of great assistance in the parallel professional fitness-to-practise jurisdiction. A number of legal handbooks are available. The most recent one, written as a practical handbook for those appearing at hearings and their advisers, is particularly readable.[13] Another handbook is accompanied by a website which provides case law updates.[14] Solicitors specialising in regulatory law issue case law briefings, which are available on the web. The Association of Regulatory and Disciplinary Lawyers issues a newsletter, available online.

David Bleiman is an independent adjudicator who is also a member of the Employment Appeal Tribunal and a Council member of the General Teaching Council for Scotland. He writes here in a personal capacity.

[1] P Case, 'Putting Public Confidence First: Doctors, Precautionary Suspension, and the General Medical Council' (2011) 19 Medical Law Review 3, 344 to 345.

[2] E.g. GMC criteria include the public interest, NMC criteria further include the interests of the registrant.

[3] *Madan v General Medical Council* [2001] EWHC Admin 577, [2001] Lloyd's Rep Med 539.

[4] Law Commission, Scottish Law Commission, Northern Ireland Law Commission, Joint Consultation Paper LCCP 202/SLCDP 153/NILC 12 (2012).

[5] *Madan* cited above.

[6] *R v Jones (Anthony William), R v Purvis (Paul Nigel), R v Hayward (John Victor) (No 2)* [2002] UKHL 5.

[7] *Tait v Royal College of Veterinary Surgeons* [2003] UKPC 34.

[8] For example, Medical Act 1983, s1A and Opticians Act 1989, s2A.

[9] Dentists, chiropractors, osteopaths.

[10] E.g. Fitness to Teach and Appeal Rules 2012 of the General Teaching Council for Scotland. Dealing with a case fairly and justly is there defined as doing so, so far as practicable, in ways which are a) proportionate to the complexity of the issues; b) seek informality and flexibility in proceedings; c) ensure that parties are able to participate fully in proceedings; and d) avoid delay, so far as compatible with the proper consideration of the issues.

[11] 'Short life that may leave lasting legacy', Walter Merricks. Tribunals winter 2011.

[12] Department of Health, 'Fitness to Practise Adjudication for Health Professionals: Assessing Different Mechanisms for Delivery: Consultation Report' (2010) p11.

[13] 'Professional discipline and healthcare regulators: a legal handbook.' Christopher Sallon et al. LAG (2012).

[14] 'Disciplinary and regulatory proceedings.' Sixth edition. Brian Harris, Andrew Carnes. Jordans (2011).

Quality cycle that turns on EVALUATION

Kay Evans considers the story of evaluation, which has its roots in both education and manufacturing, and describes how a focus on improved performance meant that a cross-college evaluation strategy was one of the early considerations for the Judicial College.

For participants on a training course, evaluation is often little more than filling in a feedback form at the end of the event. For those involved in the design and delivery of training it is very much more. Evaluation is an integral part of a systematic approach to training. This approach begins with the identification of the learning needs and the learning outcomes to be addressed. It also incorporates the design and delivery of training and ensures that the training meets those needs by achieving the outcomes.

As well as assuring the quality and value of training, evaluation also provides the opportunity to identify further learning needs and so the cycle continues.

Objectives

Training evaluation is considered to have originated in the 1950s with the early work of the American educationalist RW Tyler. Tyler's eight-year study of primary education used a system of objectives to structure the curriculum. Tyler believed that the process of evaluation was essentially the process of determining the extent to which those objectives were met. Moreover he believed that establishing objectives at the start of the design process encouraged teachers to consider the most effective methods of delivering the training and thereby achieving those objectives.

Objective setting is now one of the most widely used methods of designing and subsequently evaluating training in the workplace. The process encourages an objective approach to evaluation by setting the outcomes, standards and conditions required for effective performance during the design stage and then building evaluation strategies into the training programme.

Total quality management

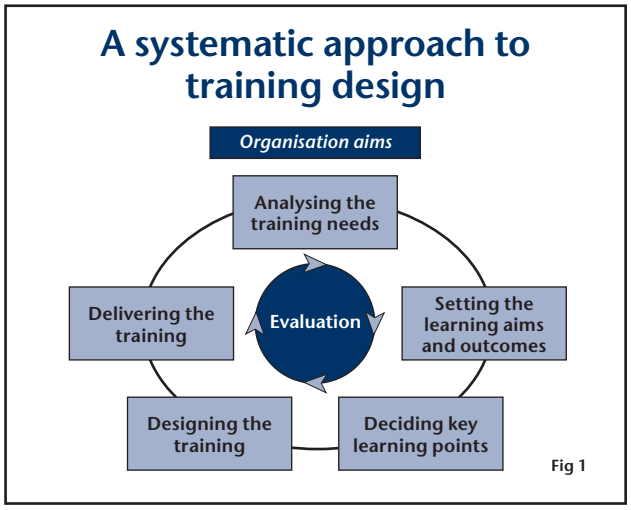
During this same period and led by the American statistician WE Deming, manufacturing industries began developing a system of improvement that became known as 'total quality management' (TQM). Deming's approach[1] encouraged manufacturers to monitor production constantly, providing immediate feedback so that improvements could be made in real time as well as at the end of the process. In the 1960s trainers also began to make use of these monitoring and feedback techniques.

Traditionally the process of data gathering . . . examined the impact of the training from the participants' point of view only.

Collecting data

Traditionally the process of data gathering for evaluation took place after the training course, at the end of the training cycle, and examined the impact of the training from the participants' point of view only. In 1993, Martha Reeves wrote that evaluation should be integral to the training design cycle. Reeves explained that designing the evaluation process alongside the development of the training would make it easier to decide what data needed to be collected and how to do so effectively.

The systematic approach model illustrates the stages of training development and design, and



locates evaluation at the heart of the process (see figure 1).

Improved performance

Identifying clear learning outcomes at the start of the design process makes validation of the training and the early stages of evaluation a relatively straightforward process. Current models of evaluation reflect the TQM ideal of continual monitoring to provide feedback for improved performance. This focus on improved performance is why a cross-college evaluation strategy was one of the early considerations for the Judicial College.

Models of evaluation

Since the 1950s a variety of models have been developed to describe the ways in which training might be evaluated, many of which have been based on Kirkpatrick's (1967) Four Levels of Evaluation model.[2]

- Level 1 – what was the reaction of the participants to the learning?
- Level 2 – to what degree did participant acquire the intended knowledge, skills or attitudes from the training?
- Level 3 – what change has there been in their behaviour in the workplace?
- Level 4 – what are the overall results or wider benefits (to the judiciary) of the training?

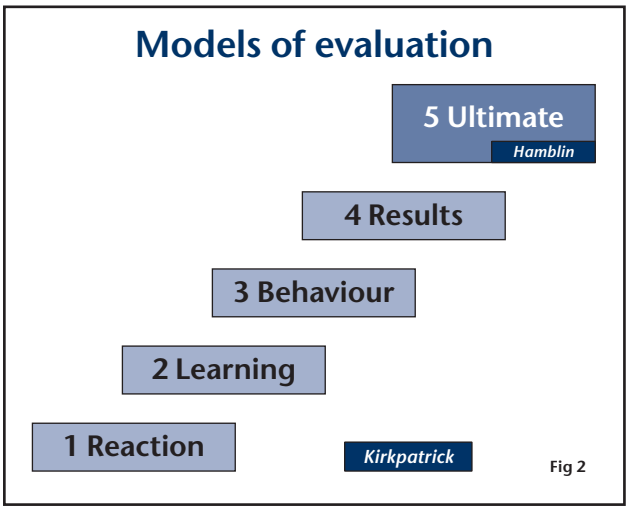
Hamblin's (1974) model[3] extended these four levels to include a fifth level of 'Ultimate'; this level explores the potential impact of the training on the world beyond the immediate workplace or organisation.

Judicial training

The purpose of the evaluation strategy was to establish the Judicial College's philosophy and approach to evaluation across all the jurisdictions, in order to identify areas of good practice that can be shared across the College; identify training courses where additional support may be required and to facilitate comparative reporting of the College's training to its committees and the Board.

When devising the strategy the College recognised that while it required a basic level of common data from all its members, a flexible approach to the practice of evaluation would be necessary to accommodate the variety of training activities delivered by its members. Kirkpatrick's 'Four Levels' model (see figure 2) provided the framework for feedback and evaluation.

This model is commonly used across public and private sector organisations; nevertheless the development of the strategy was driven by the need to demonstrate effective training rather than strict adherence to academic theory.



Shared process

The starting point for the development of this shared approach to evaluation and indeed the biggest challenge was to identify what was already being done by the various component parts of the College and to see how they could be brought together in one coherent form. Members already had their own established methods of collecting data and evaluating their training, and while all understood the value of a shared process, agreement about what that shared process should be took time.

Conversations with all the various training groups and committees provided many opportunities to understand how evaluation was managed across the jurisdictions. This exercise identified a range of sophisticated practices and, as such, provided opportunities for different jurisdictions to learn from one another. The strategy document and the common feedback form were constantly reviewed to ensure that all views were taken into consideration, where possible, and care was taken to reflect the language of those views in the final version.

The strategy was designed to provide a common baseline for evaluation at levels one and two. However, members were also encouraged to continue using the wide range of other valuable evaluation practices, many of which involved evaluating training at level three – identifying changes in behaviour in the workplace through interviews and appraisal discussions post training.

As a result of the exercise, courts and tribunals shared experiences and expertise which produced a common process for the gathering of feedback data that will support the future development of judicial training, while maintaining a high level of innovation.

The strategy in practice

While the College's strategy focuses on the processes for gathering common data at levels one and two, it also provides opportunities for exploring evaluation at levels three and four – change in behaviour and organisational results – where and when appropriate. The common data enables course directors to improve their training on a continual basis. However, in certain cases, they may choose to carry out more in-depth, targeted research. This may be because the course is newly designed, or has received some challenging feedback, or because they wish to demonstrate that the training is being transferred into the workplace effectively. In these cases, the College will help course directors devise a strategy to collect data, usually via a questionnaire and/or a series of one-to-one interviews. The findings will be analysed and a report provided, together with advice for further development.

Currently evaluation practices tend to focus on specific courses – however, the College is also working with a further tribunal training team to evaluate its entire suite of training courses.

Education advisers at the College have recently supported a variety of tribunal training teams with targeted evaluation projects. One tribunal has completely redesigned one of its key skills courses as a result of a piece of research and the course is now being delivered in a more targeted and effective way. Another tribunal is revising its methods of delivering training by using some targeted evaluation techniques to explore how effective their existing methods are.

Currently evaluation practices tend to focus on specific courses – however, the College is also working with a further tribunal training team to evaluate its entire suite of training courses. This will be a large piece of research work which will inform the design of all their training courses for the future and which will act as a pilot for other jurisdictions that wish to carry out a programme-wide evaluation.

Evaluation of training has its roots in both education and manufacturing, a fusion of two cultures that provided us with a set of useful frameworks and models. The aim of the College's evaluation strategy is to enable its members to demonstrate the value and the effectiveness of the training they provide. The data gathered also enables us to demonstrate the learning that took place and to identify further learning needs – all of which will ensure the continued quality of the training offered by the Judicial College.

None of this can be done without the support of participants who diligently complete their feedback forms at the close of every course and to whom we always say a very sincere 'thank you'.

Kay Evans is an education and development adviser at the Judicial College.

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[1] Deming WE (1986) Out of the Crisis, MIT Press.

[2] Kirkpatrick, D (1967) Evaluation of training. In Craig RL and Bittel LR (eds) Training and Development Handbook, New York: McGraw-Hill pp87–112.

[3] Hamblin AC (1974) Evaluation and Control of Training, Maidenhead: McGraw-Hill.

Judicial College Academic Lectures

An advertisement has been placed on the judicial intranet concerning the above programme. Four distinguished speakers have agreed to deliver a lecture on 'Being a judge in the modern world' at four different cities – London, Cardiff, Manchester and Oxford. The first lecture took place in London in January 2013. Bookings are now being taken for the second lecture in Cardiff. Please log on to the judicial intranet to activate the booking process via the advert. If you experience any difficulty in accessing the booking system please e-mail *JudicialCollegeWeb@judiciary.gsi.gov.uk* with your contact details.

Lecture 2: The Lord Judge, Lord Chief Justice of England and Wales, in Cardiff, **21 February 2013.**

Lectures 3 and 4 will be open for bookings in the early part of 2013. However, you may wish to note the speakers, locations and dates now in order to decide which lecture to attend.

- **Shami Chakrabati**, Director of Liberty, will deliver the third lecture, in Manchester, **25 April 2013**.
- **Lord Justice Leveson**, Judge of the Court of Appeal, will deliver the fourth lecture, in Oxford, **13 June 2013**.

Important information to note before booking

The lectures will commence at 5.30 pm and will run for approximately one hour and will be followed by light refreshments provided by the host venue.

Places are limited and are available to all judicial office-holders in courts and tribunals, on a first come, first served basis. In order to allow as many judicial office-holders as possible the opportunity to attend, you are asked to make only one booking in the lecture series.

Please note that no travel expenses, nor subsistence, nor fees are payable for attendance, nor will any CPD points be accrued.

A clear and unambiguous right to RESPECT

A new judicial policy on equality goes beyond the ambit of the judicial oath and addresses the position of judges as colleagues in the workplace. *Mary Stacey* describes its significance.

October 2012 may have seemed an inauspicious month – damp, grey, autumn weather after a good late summer, and the success of the Olympics and Paralympics already a distant memory. But it also marked the publication of a trinity of important documents concerning equality and diversity for the judiciary which directly affect all members of the courts and tribunals judiciary in England and Wales, including fee-paid, non-legal officeholders, magistrates and all other lay officeholders, and reserved tribunals' judiciary operating in Scotland and Northern Ireland.

In line with good practice recommended in the Equality Act 2010 statutory code of practice on employment, the judiciary now has a 'dignity at work' statement, a brief guide to the Equality Act 2010 and a letter from both the Lord Chief Justice and Senior President of Tribunals stressing the importance of equal treatment and the non-discrimination principle. Together they form the Equality and Diversity Policy for the Judiciary.

It is more than merely symbolic as it is an authoritative and transparent assertion of the standard expected.

Oath

Inherent in our oath to judge without fear or favour, affection or ill will is an obligation to treat all parties, representatives and witnesses before us equally and fairly that predates modern concepts of discrimination and equality under international human rights instruments, the Equality Act 2010 and its predecessor legislation.

So you may ask, since the judicial oath governs our judicial functions, why do we need an Equality and Diversity Policy for the Judiciary? I believe its significance is two-fold. First, it has long been recognised that the formulation and publication of such a statement demonstrates the importance of equality both within the organisation and to the outside world. It is more than merely symbolic as it is an authoritative and transparent assertion of the standard expected.

Comprehensive

Secondly, the new documents go boldly beyond the ambit of the judicial oath and address our position outside the court or tribunal room in the workplace: as colleagues – both towards our fellow judges and staff; in the context of management functions and judicial leadership; committee work; and in the area of training and development. It is comprehensive in its scope:

> 'The Lord Chief Justice and the Senior President of Tribunals expect all judicial office-holders to treat their colleagues and members of staff decently and with respect. They are committed to ensuring that the environment in which judicial office-holders and staff work is free from harassment, victimisation and bullying and that everyone is able to work in an atmosphere in which they can develop professionally and use their abilities to their full potential.'

It goes on to say:

> '. . . judicial office-holders are expected to treat everyone with the same attention, courtesy, consideration and respect, regardless of age, disability, gender

reassignment, marital or civil partnership status, pregnancy or maternity, race, religion, sex and/or sexual orientation (known collectively as "protected characteristics").'

The clear, unambiguous language, free from caveat and not hedged by qualification, asserts the entitlement to dignity and respect for all judges and staff which is especially important in the current climate of uncertainty and change. By setting the minimum standard it articulates the expectation of behaviour.

Equality Act

It is important to note that the Equality Act, which has now largely been in force since 2010, provides comprehensive protection from discrimination and that the exemptions, such as for judicial functions, are likely to be narrowly construed and be limited to core adjudicative duties. The new policies therefore reflect the scope of our statutory rights, duties and obligations under the Act. The companion 'Brief Guide to the Equality Act' is particularly helpful as it provides an outline of the law and a number of examples, all drawn from judicial life, to illustrate the principles in practice (see below).

Equal opportunities policies have been commonplace throughout the private, public and voluntary sectors since anti-discrimination legislation was first introduced in the 1970s and it is refreshing that we now have our own, compliant with the current legislation.

Mary Stacey is an employment judge.

A brief guide to the Equality Act 2010

Most of the Equality Act 2010 is now in force. The Act not only harmonises and consolidates previous anti-discrimination legislation, it also strengthens legal rights to equality and increases the range of unlawful acts of discrimination outside the employment field. In addition it places a new set of statutory equality duties on public authorities. The equality duty (s149) requires public authorities, in the exercise of their public functions, to have due regard to eliminate prohibited discrimination, harassment and victimisation, and advance equality of opportunity and foster good relations between different groups of people.

While the 'judicial function' is exempt from the prohibition on discrimination in the exercise of public functions, this exemption is likely to be limited to the core, adjudicative function. Ancillary functions, e.g. training, mentoring, conducting appraisals, managerial or committee functions and conduct towards colleagues or court staff will not be exempt.

The guide is an outline of the major provisions within the Act as they may affect the judiciary and is not intended as a definitive statement of the law. It also includes some examples showing how the Act may affect the judiciary.

Protected characteristics

The Act identifies nine protected characteristics, or specific rounds of discrimination which it treats as suspect grounds, or suspect classifications which are intrinsic to an individual's dignity and autonomy.

The protected characteristics are:

• age • disability • gender reassignment • marital or civil partnership status • pregnancy and maternity, • race • religion • sex • sexual orientation

The Equality Act makes it unlawful, in a variety of ways and contexts, to discriminate against someone by reason of any one of these characteristics.

Types of discrimination as defined in the Act

Direct discrimination (s13) occurs if a person is treated less favourably than another person is or would be treated because of their possession of one of the protected characteristics. In general, direct discriminationcannot be justified.

This form of discrimination also extends to cases where someone is perceived to have the relevant characteristic.

e.g. A judge of Iraqi origin, unlike her colleagues, is not invited to the cathedral court service at the start of the legal year 'because she is Muslim'. In fact she is not Muslim, but is perceived as such and treated less favourably because of this perception.

Discrimination by association occurs if a person is treated less favourably, not because of a protected characteristic that she or he personally has but because they are linked or associated with someone who has a protected characteristic.

e.g. A carer for a disabled person is passed over for advancement because they are perceived as having responsibilities which will not allow them to concentrate fully on their role.

Indirect discrimination (s19) occurs if a rule or practice which applies to everyone across the board has the effect of disadvantaging people possessing a particular protected characteristic and the rule or practice cannot be justified as being a proportionate means of achieving a legitimate aim.

e.g. A rule is made that a particular training session will be held between 6pm and 8pm. Although the rule is applied across the judiciary, it places those with caring responsibilities at a particular disadvantage because they need to be at home before 8pm. The training organisers would be required to demonstrate that the indirectly discriminatory timing of this particular session was a proportionate means of achieving the legitimate aim of judicial training on this topic.

Special provisions now govern the different forms of disability discrimination. The Equality Act 2010 recognises that more than formal equality is required to enable disabled people to participate as fully as possible in society. In addition to protection from direct and indirect discrimination, reasonable adjustments may be required to assist a disabled person who, because of his or her disability, is placed at a substantial disadvantage in comparison to others without that disability (s20). These may be, for example, by adaptations or modification to premises, physical features or different arrangements, such as sitting times.

Making such adjustments may involve the judicial office-holder and/or HMCT and, depending upon the circumstances, this will often require the office-holder and the administration to liaise.

Unlawful discrimination may also occur if a disabled person is treated unfavourably because of something arising in consequence of his or her disability, which cannot be shown to be a proportionate means of achieving a legitimate aim (s15).

e.g. A judge is diagnosed as having a visual impairment and requires adapted IT equipment, but is told that funding is not available for a 'non-standard' kit. The Ministry of Justice may be required to make the necessary adaptations to the equipment for the judge.

Pregnancy and maternity-related discrimination occur if a woman is unfavourably treated because of a current or previous pregnancy, or because she has given birth (ss17 and 18).

e.g. A judge is told she will not be authorised to sit in a particular jurisdiction because she is pregnant and will be unable to sit while on maternity leave.

Finally, harassment and victimisation are specific foms of prohibited conduct defined in the Act. Harassment is unwanted conduct related to the protected characteristic of age, disability, gender reassignment, race, religion or belief, sex or sexual orientation, which has the purpose or effect of violating the other person's dignity or creating an unpleasant environment (s26).

e.g. A member of court staff is repeatedly praised for her sweet nature and when she complains about being patronised, it does not cease. This is likely to be unlawful harassment.

Victimisation occurs when one person subjects another person to a detriment because that other person has brought proceedings under the Equality Act 2010, has given evidence or information in connection with any such proceedings, has made an allegation that someone has contravened the Act, or has done any other thing for the purposes of or in connection with the Act (s27).

e.g. A magistrate supports a fellow magistrate who makes a complaint of discrimination against another magistrate. When she makes enquiries about applying to sit in the Youth Court she is told that her application will probably fail. If this is because of her involvement in the previous case it is likely to constitute unlawful victimisation.

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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