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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.

Tribunals is published three times a year by the Tribunals Committee of the Judicial Studies Board, although the views expressed are not necessarily those of the Board.

Any queries concerning the journal should be addressed to:

Publications Coordinator

Judicial Studies Board

9th Floor

Millbank Tower

London

SW1P 4QU

Tel: 020 7217 4738

Fax: 020 7217 4779

E-mail: publications@jsb.gsi.gov.uk

Website: www.jsboard.co.uk

EDITORIAL



The theme of the articles published by the journal continues to be one of reform, although this issue has a particularly financial flavour. On pages 5 to 8, Nuala Brice and Henry Russell draw an interesting picture of the implications of the unified Tribunals Service for a group of the oldest existing tribunals – the tax tribunals. Their articles demonstrate some of the ways in which drawing different jurisdictions under one umbrella can rationalise the ways in which disputes are resolved – although Nuala’s article includes an exhortation to those drafting the procedural rules for the new unified tribunal not to lose some of the existing system’s procedural efficiencies.

The jurisdictions of different tribunals often run parallel to those of ombudsmen without any apparent overlap between the two. While tax tribunals, for example, hear disputes on the assessment of taxes, the ombudsman (or, in this case, Revenue Adjudicator) hears complaints relating to the maladministration of those decisions. It is the work of another ombudsman, the Financial Ombudsmen Service (FOS), to ‘promptly and informally’ resolve individual disputes between consumers and financial firms, with a financial limit of £100,000.

On page 13, Walter Merricks, the Chief Financial Ombudsman, gives one perspective on how early responses to complaints can be tailored to their complexity without compromising on the satisfaction ratings of complainants. While he acknowledges that the experience of ombudsman schemes could not be carried over unchanged into tribunals, it seems tribunals might have something to learn from the flexibility and scale of the schemes operated by ombudsmen, particularly in the light of the White Paper’s emphasis on ‘proportionate dispute resolution’.

Walter Merricks’s description of the FOS is followed by an assessment of the methods it employs, carried out by Professors Elaine Kempson and Nick Moore of the Personal Finance Research Centre at the University of Bristol, which, in the main, gives the Service a ringing endorsement.

Lord Justice Carnwath continues with his series of regular columns for the journal, with a description of the implications of the Constitutional Reform Act for the tribunals judiciary.

We hope that you find this autumn issue of the journal an interesting read. Your comments and suggestions are, as ever, welcome, in one of the ways listed below.

P R O F E S S O R H A Z E L G E N N

JSB, 9th Floor, Millbank Tower,

London SW1P 4QU

tribunals@jsb.gsi.gov.uk

Forthcoming issues

The **Spring 2006** issue of the journal will consider different aspects of the Constitutional Reform Act 2005, and in particular the implications for the tribunals judiciary of moving under the aegis of the Lord Chief Justice and being administered as part of the ‘mainstream’ judiciary. The issue will also include the second of a series of articles by Andrew Bano on fact-finding.

The **Summer 2006** issue will consider the ways in which different tribunals are using alternative methods of dispute resolution, such as mediation, and will also look again at the topic of unrepresented parties and in particular at how far chairmen and members should ‘lean over the bench’ in their attempts to help them.

WEIGHED *in* the BALANCE



In the first of a series of articles on fact-finding, ANDREW BANO describes the rational process by which a tribunal can establish the facts of a case.

In his book, *The Business of Judging*, Lord Bingham casts doubt on the emphasis that has traditionally been placed on the demeanour of witnesses in the process of fact-finding. The evaluation of evidence is now seen increasingly as a rational, rather than as an intuitive, process.

In this article, I have attempted to identify the key elements in the process of logical fact-finding. I touch first on the tribunal's fact-finding role and the types of factual issue that a tribunal may be called on to decide.

The tribunal's fact-finding role

Fact-finding is the central task of most tribunals. The tribunal hearing is usually the first, and often the only, time that the facts of a case are judicially determined. But the decision of a tribunal may be held to be wrong in law on the ground of procedural error, irrationality or inadequacy of reasons (see *Nipa Begum v Tower Hamlets LBC* [2000] 1 WLR 306), and the majority of appeals from tribunals to Social Security Commissioners that succeed do so because the process of fact-finding has not been properly carried out.

Issues of fact

There are a number of different types of factual issue that can be encountered by a tribunal, including:

- Whether an event, or series of events, took place.
- Decisions on a state of mind, e.g. in an unfair dismissal case, the reason for the dismissal.
- Inferences or deductions from primary facts.
- Judgements and evaluations, e.g. whether a person reasonably requires continual supervision throughout

the day in order to avoid substantial danger to himself or others, or whether an employer has acted reasonably in all the circumstances in treating a reason for dismissal as sufficient.

- Causation, e.g. whether disablement is due to service in the armed forces.
- Medical diagnosis, e.g. whether a person has a prescribed disease.

A logical approach

'The tribunal is a relatively poor environment in which to make judgements about deceit from demeanour.'

Assessing credibility, Professor Hazel Genn,
Tribunals, Vol 11, issue 1

The first stage in the process of logical fact-finding is to identify those facts in the case that are certain, or almost certain. It will then be possible to assess the probability of the facts that are in dispute by deciding how well they fit into the overall picture. As Lord Devlin put it in *The Judge* (quoted by Lord Bingham in *The Business of Judging*): 'It is the tableau that constitutes the big advantage, the text with illustrations, rather than the demeanour of a particular witness.'

Some facts may be agreed or not seriously disputed. Other facts may be established in ways that do not depend on human recollection, such as through independent reports. But in very many cases it is documents that play the key role in establishing the factual framework against which the credibility of the witnesses should be assessed. The mere assertion of a fact in a document does not necessarily make that fact

more probable, but documents that were written before any dispute arose, or that were written for purposes unconnected with the dispute, may throw a very clear light on the knowledge and intentions of the parties at the time when the document was written.

Oral evidence

‘Be wary of making judgements on the basis of body language or tone of voice. Body language varies significantly and this is more apparent in the tense atmosphere of the courtroom.’

Equal Treatment Bench Book, March 2004

As Lord Bingham points out, the reliability of oral evidence given by even an honest witness may be affected by factors such as a genuine but inaccurate perception of an event, loss of recollection or wishful thinking. When evaluating oral evidence, it will also often be necessary to consider factors such as how well placed the witness was to give reliable evidence and the extent of any interest the witness may have in the outcome of the dispute.

But in deciding whether a witness is telling the truth, it will almost always be necessary to test the consistency of the witness's evidence with what is agreed, or clearly shown by other evidence, to have occurred. Other tests of credibility include the internal consistency of the witness's evidence, the consistency of the evidence with what the witness has said on other occasions and, finally, the demeanour of the witness. However, the evidence of the witness should always be evaluated by reference to the other evidence in the case taken as a whole.

The approach in practice

Let me illustrate how the approach works in practice. An elderly woman was in receipt of a retirement pension on the basis that she was the widow of a merchant seaman who had paid UK national insurance contributions.

She lived in a country where records of life events such as births, marriages and deaths are often unreliable. In the course of an interview carried out as part of a fraud investigation, she gave an evasive and very confused account of her family circumstances. She was therefore found not to have been married to the merchant seaman and her benefit was withdrawn.

A number of facts in the case could be established beyond doubt. The names of the ships on which the deceased had served were shown on the merchant marine certificates of discharge, which had been submitted when the original claim was made. His national insurance records, which the claimant had not seen, showed that he had lived in a town in South Wales.

Taken in isolation, the claimant's failure at the investigation interview to give a coherent account of her family circumstances fully justified the decision that she was not the seaman's widow. However, she had previously correctly identified the first and last ships on which he had served and had also previously stated that he had lived in the town in South Wales shown as his address on the national insurance records.

By evaluating her credibility by reference to the known facts, a very different picture emerged, particularly as it became clear that the account she had given at the investigation interview could be explained by matters that were unconnected with her identity.

... the evidence of the witness should always be evaluated by reference to the other evidence in the case taken as a whole.

Balancing

‘Few people do better than chance in judging whether someone is lying or truthful.’

Assessing credibility, Professor Hazel Genn, Tribunals, Vol 11, issue 1

The importance of evaluating oral evidence by reference to all the other evidence in the case was highlighted

by Robert Goff LJ in *Armagas Ltd v Mundogas SA* [1985] 1 Lloyd's Rep 1, 57:

'It is frequently very difficult to tell whether a witness is telling the truth or not; and where there is a conflict of evidence . . . reference to the objective facts and documents, to the witness's motives and to the overall probabilities, can be of very great assistance to a judge in ascertaining the truth.'

It is now clear that a failure to follow the approach in Armagas may amount to an error of law.

In *Anya v University of Oxford* [2001] ICR 847, the Court of Appeal reversed the decision of an employment tribunal in a race discrimination case, holding (per Sedley LJ at p 861) that the tribunal had:

' . . . not given any ground, and none is evident, for departing from this classic mode of reasoning in a case where every one of the ingredients mentioned by Robert Goff LJ was present.'

It is now clear that a failure to follow the approach in *Armagas* may amount to an error of law. In *Heffer v Tiffin Green* (1998) *The Times*, 28 December, Henry LJ held that it was crucial to test the evidence of a witness against 'the objective facts, the contemporaneous documents, the motives of those involved or the lack of them and the overall probabilities', and held that the judge's judgement in that case had been arrived at:

' . . . without sufficient regard being paid to the building blocks of the reasoned judicial process, where the evidence on each issue was marshalled, the weight of the evidence analysed, all tested against the probabilities based on the evidence as a whole, with clear findings of fact and all reasons given.'

Rules of evidence

In assessing the probative value of the evidence in front of them, tribunals are not bound by the same strict rules of evidence that apply in civil courts.

The rules of most tribunals provide that they may allow evidence of any fact to be given in any way it may think fit, and must not refuse evidence simply on the ground that it would be inadmissible in a court. However, a factor that makes evidence inadmissible at common law may affect the weight of the evidence in proceedings where it is admissible. Direct evidence, based on a person's own knowledge, may be tested and for that reason is generally afforded significant weight. Hearsay evidence, however, is second-hand, cannot be tested by questioning and is generally considered less reliable.

Recording findings

Finally, care must be taken when drafting the tribunal's written decision to ensure that it can be seen from reading the decision that what Henry LJ called the 'building blocks of the reasoned judicial process' are all in place.

ANDREW BANO is a Social Security Commissioner.

The Spring 2006 issue of this journal will include the second article in this series, when Andrew Bano will consider how chairmen can use their professional and personal skills to create the conditions in which successful fact-finding can take place.

THE PERFECT TRAINING DELEGATE . . .



. . . fills in (and returns) their evaluation questionnaire

WILL FOUR GO *into* ONE?

Under the new Tribunals Service, appeals relating to direct and indirect taxes will be heard by the same tribunal.

NUALA BRICE *considers the implications for tax tribunals, some of which are over 200 years old.*

We are all aware of the wide proposals for tribunal reform contained in the White Paper *Transforming Public Services: Complaints, Redress and Tribunals*, published in July 2004. However, what may not be so widely known are the proposals for a unified tax tribunal, which are also mentioned in the White Paper. It is expected that the changes to the tax tribunals will come into force at the same time as the reform of tribunals generally.

The four existing tax tribunals

For historical reasons we now have four tax tribunals. The oldest is the *General Commissioners* who hear some appeals from decisions of what was the Inland Revenue, and whose position is described more fully in an article by Henry Russell on page 8.

The *Special Commissioners*, first appointed in 1805, also hear appeals from decisions of what was the Inland Revenue. When they were first appointed, all appeals related to income tax but since then many other direct taxes have been introduced (inheritance tax, capital gains tax and corporation tax, to name but a few) and they hear appeals about them all. They have a President (Stephen Oliver QC) and there are five other full-time, and about 20 part-time, Special Commissioners, all of whom are lawyers of at least 10 years' standing. Appeals are now held in public and the Special Commissioners publish all their decisions. Certain direct tax appeals must be heard by the Special Commissioners, while in other cases taxpayers may choose to have their appeals heard by the Special Commissioners rather than the General Commissioners. Sometimes, a direct tax appeal is lodged with the General Commissioners but later transferred to the Special Commissioners. The Special

Commissioners sit alone for less complex appeals and as a bench of two for more complex appeals.

The third tribunal is the *Section 703 Tribunal*, whose jurisdiction is limited to the cancellation of tax advantages from certain transactions in securities. Its President is Stephen Oliver QC, and its members have special financial or commercial knowledge.

The most recent tribunal of the four is the *VAT and Duties Tribunals*, which were first appointed in 1972 to hear appeals from decisions of what was then Customs and Excise about value added tax. Since then many other indirect taxes have been introduced (for example, customs duties, excise duties, insurance premium tax and landfill tax) and the VAT and Duties Tribunals hear appeals about them all. They have a President (Stephen Oliver QC) and there are presently five other full-time and about 30 part-time chairmen, all of whom are lawyers of at least 10 years' standing. Appeals have always been held in public and the VAT and Duties Tribunals publish all their decisions. The Tribunal also has a panel of more than 100 lay members, and most appeals are heard by a tribunal of one chairman sitting with one or two members.

All Special Commissioners are now also Chairmen of the VAT and Duties Tribunal, so to that extent there has been some merger of the two tribunals. But the tribunals still have different procedural rules for historical reasons.

Proposals for reform

Proposals for the reform of the tax tribunals generally have been around for about 30 years, mainly driven by the professional bodies. Most of those who supported

reform had two main aims. The first was to combine the tribunals dealing with direct and indirect taxes into what used to be called a unified tax tribunal. The second aim was to reduce the number of levels of appeal.

Here it is worth bearing in mind that there are now five possible levels of tax appeal, namely the first tribunal followed by the High Court, the Court of Appeal and the House of Lords with, at any of these stages, a possible reference to the European Court of Justice. (The VAT and Duties Tribunals have made a number of references to the European Court of Justice.) Although it is at present possible for some complex appeals from the VAT and Duties Tribunals and the Special Commissioners to go direct to the Court of Appeal, the normal number of levels of appeal is four. However, this can be increased to six if the Section 703 Tribunal comes on the scene. So, clearly, a reduction in the number of the levels of appeal is desirable.

In March 2000, the Lord Chancellor's Department (as it then was) started to develop the process of reform with a Tax Appeal Reform Project (known as TARP).

A consultation paper was published and a committee was formed with representatives of interested parties. Then on 18 May 2000, Sir Andrew Leggatt was appointed to review all tribunals and, in August 2001, he published his report, which recommended a single tribunal system for all tribunals with two tiers. The first tier (the Tribunal) would hear all appeals at first instance, and there would be an Appeal Tribunal that would hear all appeals from the Tribunal.

The report envisaged that the four existing tax tribunals would fit into this new system, with most direct and indirect tax appeals starting in the Finance and Tax Division of the Tribunal but some complex appeals being heard at first instance by the Appeal Tribunal (which would also hear appeals from the Tribunal). Thus the reform of the tax tribunals would take place within the wider context of the reform of tribunals generally.

Sir Andrew's proposals were brought forward into the White Paper. Although in November 2004 the Queen's Speech announced a Courts and Tribunals Bill, after the general election in May 2005 the Queen's Speech did not mention the Bill again. The present thinking is that the Bill, when it comes, will be an enabling Bill leaving much of the detail to be dealt with by secondary legislation. However, amendments to primary tax legislation will also be necessary to reform the four existing tax tribunals.

Two recent events have given some urgency to the need for the reform of the tax tribunals.

There is no longer any reason to have separate tribunals for the direct taxes on the one hand and the indirect taxes on the other.

The first is the recent merger of the two revenue departments into HM Revenue and Customs. There is no longer any reason to have separate tribunals for direct taxes on the one hand and indirect taxes on the other. The second is the fact that the number of appeals to the General Commissioners has very much reduced in recent years and the position has now been reached where some Commissioners do not sit at all in any year and others sit only infrequently. Accordingly, early this year the Department for Constitutional Affairs

set up a Project Board and a Stakeholders Group to take forward the reform of tax appeals within the context of the proposed new Courts and Tribunals Bill.

What will the reforms mean in practice?

With that background in mind, it is now possible to consider what the changes will mean in practice.

One possible change may be that the same tribunal at the same hearing might be considering an appeal that concerns both direct and indirect taxes. Suppose that a trader is assessed for value added tax because it is thought that he has under-declared his takings. HM Revenue and Customs may also take the view that he has under-declared his profits for the purposes of income tax or corporation tax. As the new tribunal will be able to decide appeals relating to both direct and indirect taxes it is possible that some appeals will concern both.

Another change may be that it becomes possible for there to be a tribunal of two or three legally qualified chairmen (or tribunal judges) with no non-legal members. That type of tribunal is at present possible before the Special Commissioners and it may be that it will be carried into the new Tribunal. Conversely, appeals that can now only be heard by Special Commissioners may, in future, be heard before a tribunal with one or two lay members who have special business or financial expertise.

It may also be that, in future, tax appeals will be heard at many more local venues. The Tribunal will be replacing the General Commissioners who all have local hearings. One major advantage of the new Tribunals Service will be that the premises used by all the tribunals will become available for use by all, thus facilitating local hearings.

There could also be changes to the procedural rules of the existing four tax tribunals. It may well be that there will be uniform rules applicable to the whole of the Tribunal and Appeal Tribunal. At least, it is likely that there will be one set of rules for the Finance and Tax Division of the new Tribunal, dealing with both direct and indirect taxes. It is to be hoped that the new rules will contain the best of the current arrangements, particularly about costs. Although costs are not regarded as an important issue in many tribunals, in the tax tribunals they can be of prime importance. It is generally thought to be unfair that a taxpayer may have to pay very substantial sums in professional costs in order to prove that a revenue authority was wrong to assess him to tax.

A final change could be that there may be some development of alternative dispute resolution – either mediation or conciliation or otherwise. At the moment the way in which this could be applied to the tax appeals process is unclear because HM Revenue and Customs already have a well-developed system of local re-consideration and review. But there may be

scope for some resolution of issues without recourse to formal hearings.

So far, all we have are the broad outlines of reform and a number of questions still remain unanswered. Perhaps the most important is whether there should be some provision for complex appeals to start in the Appeal Tribunal, as recommended by Sir Andrew Leggatt. This is relevant because at present some appeals can lie direct to the Court of Appeal from the Special Commissioners and the VAT and Duties Tribunals. If those complex appeals had to start in the Tribunal, and then appeal to the Appeal Tribunal before going to the Court of Appeal (with leave), then the new system would have added a level of appeal rather than reducing the total of the levels of appeal. If it were to be accepted that some complex appeals will start in the Appeal Tribunal, then there would have to be some criteria that would help to decide if a particular appeal fell within that category.

Another question that has still not been decided is whether the Appeal Tribunal should be given judicial review powers,

or power to award damages, or power to award interim payments. If tax appeals are no longer to go to the High Court, will it still be necessary for taxpayers to apply to the High Court for these remedies?

Conclusion

It is very possible that in two or three years' time the four separate tax tribunals will, after their long history, cease to exist and become instead part of the new Tribunal and new Appeal Tribunal, which will also encompass almost all existing tribunals. Let us hope that the new arrangements also last for 200 years.

DR NUALA BRICE is a full-time chairman at the VAT and Duties Tribunals.

Further details on the tribunals mentioned in this article can be found at www.financeandtaxtribunals.gov.uk.

It is to be hoped that the new rules will contain the best of the current arrangements, particularly about costs.

The ELDER SIBLINGS



The oldest existing tribunal, the General Commissioners, are resigned to their demise with the creation of the new Tribunals Service. HENRY RUSSELL traces their history.

The background and context for tax tribunals' reform has been set out in the preceding article. General Commissioners of Income tax have faced reform for the last 10 years at least. These proposals will bring an end to the tribunal, a fate to which the majority of General Commissioners are now resigned.

General Commissioners are the elder siblings of the Special Commissioners and chart their history from Pitt's Income Tax Act 1799, their qualifications for appointment being 'persons as respectable in the station and rank of life, as independent of all real or imputed influence and as likely to discharge the duties of the station with diligence and ability as possible'. General Commissioners see themselves as following in that tradition.

General Commissioners have historically been appointed to the tax divisions, defined by civil parishes and arranged in counties, with a system of county advisory committees, usually chaired by the Lord Lieutenant. Each division of General Commissioners is independent. The system has no presidential structure, and so there is no route of accountability to the Lord Chancellor or the Lord Chief Justice. Each division of General Commissioners appoints a chairman and a clerk who supplies administrative support and legal advice. The National Association of General Commissioners was established in 1995, with a dual role of representing and training General Commissioners.

Self-assessment

Recent years have seen a growing number of amalgamations of divisions taking place in the light of reducing workload, as the result of self-assessment, and the removal of the large number of 'delay' hearings that were made by taxpayers or the accountants to protect their right to appeal. Hearing lists for a day's sitting would usually be very long, but with few substantive cases, and the vast majority of cases would be postponed.

The number of cases listed has fallen from some 200,000 a year to about 40,000. While many Commissioners are still busy, there are a large number of divisions where Commissioners sit infrequently. In response to this, the Department for Constitutional Affairs imposed a moratorium on the appointment of new Commissioners. As a result of retirements, the number of Commissioners in the UK has reduced from some 3,500 to about 2,100.

Changes

The Stakeholders Group is making recommendations, described in Nuala Brice's article, for the lower tier of the tax appeals jurisdiction, currently the territory of the General Commissioners, whose work will be subsumed into the new first-tier tribunal. Non-legal members will be 'suitably qualified' and they will be appointed on the basis of the qualifications, skills and the experience that they would bring.

The proposed reforms will bring an end to the General Commissioner tribunal. The large numbers of Commissioners that exist now will not be needed. The new tribunal will have a core of full-time legal members and part-time legal and non-legal members to deal with the current level of appeals. It may be able to accommodate some of the existing Commissioners if they meet the 'suitably qualified' criterion. Likewise, some of the clerks may find a role as legal members.

For 206 years, General Commissioners have provided a valuable service to the taxpayer. While the vast majority of Commissioners will not go on into the reformed tribunal, they are committed to ensuring that the taxpayer continues to have a fair and independent tribunal until the new tribunal is open for business.

HENRY RUSSELL is the Chairman of the National Association of General Commissioners.



COMPETITIONS *and* CONDUCT

In the second of his regular columns, ROBERT CARNWATH describes the new procedures for appointments and discipline that will come into being for the tribunals judiciary from April 2006.

As is now well known, April 2006 will mark the launch of the new Tribunals Service, bringing together the largest tribunals under unified management. This major administrative change is not dependent on new legislation. Other parts of the White Paper proposals (including the formal appointment of a Senior President) must await new legislation.

In spite of some uncertainties over recent months, I remain confident that the Government will proceed with the promised Tribunals Bill in this session. In this article, however, I want to concentrate on two major changes that arise from constitutional reforms already on the statute book, in the form of the Constitutional Reform Act 2005. They are, first, the new arrangements for appointments under the Judicial Appointments Commission and, secondly, the procedures for overseeing conduct and discipline of tribunal members and the judiciary of England and Wales under the 'Concordat' agreed between the Lord Chancellor and the Lord Chief Justice.

Appointments

The Judicial Appointments Commission (JAC) will take over the running of competitions for both judges and most tribunal positions. It will be headed by 15 Commissioners, including a lay chairman and five other lay members, five judges, a tribunal member, a magistrate, a barrister and a solicitor. The Commission will decide how to run competitions and will make selections solely on merit. It will also have a statutory duty to encourage diversity in the range of candidates. The Commission will select one person for each post and will forward that name to the Lord Chancellor, who will have a limited discretion to reject the candidate, or require reconsideration, but may not appoint a person

who has not been selected by the Commission. The Commission's remit is generally limited to England and Wales, but it will also make selections for UK-wide tribunals, some of whose members sit in Scotland or Northern Ireland. In those cases, the Lord President of the Court of Session, the Lord Chief Justice of Northern Ireland and Scottish Ministers will be consulted as appropriate.

Tribunal expertise

A serious concern for me has been that only one of the Commissioners will necessarily have any tribunal background, although tribunals are, apart from magistrates, the largest single group of appointments. In practice, of course, the Commissioners can be expected to leave the running of individual competitions to their staff, much as it is currently done by DCA officials, and tribunal members and others will still act as members of interview panels. Further, the Commission must consult the senior judiciary, and someone who has held the office concerned or has other relevant expertise, about each competition. However, it is important that tribunal expertise should be adequately represented at all levels of the decision-making process.

Following my representations to the Lord Chancellor, it has been agreed that there will be special guidance to the JAC on tribunal appointments. This will include provision for tribunal members with the necessary experience to act as advisers to the Commission in designing and running selection processes for different tribunals.

Discipline

Another important change in April 2006 will be the new statutory framework for judicial discipline established by

the Constitutional Reform Act. The key feature of the new system is that responsibility is shared between the Lord Chancellor, as a Minister accountable to Parliament and as a guardian of the public interest, and the Lord Chief Justice, as Head of the Judiciary of England and Wales, including the tribunal judiciary. The Lord Chief Justice will make detailed regulations and rules about the new system with the agreement of the Lord Chancellor and, in the case of regulations, subject to Parliamentary approval. More detail on the Act is given on page 11.

Office for Judicial Complaints

The Lord Chancellor retains his powers to remove judicial officers, but all decisions about removals will be taken by him and the Lord Chief Justice personally, and no one can be removed unless they both agree. In less serious cases, the Lord Chief Justice has new powers to impose formal disciplinary sanctions in the form of suspension or formal reprimands, warnings or advice, which he may do only with the agreement of the Lord Chancellor. The Lord Chief Justice is likely to delegate this role to another senior judge in relation to tribunal members. In relation to UK tribunal members who sit in Scotland or Northern Ireland, the place of the Lord Chief Justice is taken by the Lord President or the Chief Justice of Northern Ireland as appropriate. This work will be processed and supported by a new, independent Office for Judicial Complaints.

In tribunals with a permanent structure and a President, complaints about tribunal members will, as now, first be considered within the tribunal, and they will only be referred upwards where removal or other formal disciplinary action may be required, or for other special reasons. However, the procedures will have to be approved by the Lord Chief Justice and Lord Chancellor. For those tribunals that do not already have written procedures in place, a draft protocol is in the course of preparation.

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If the Lord Chief Justice and Lord Chancellor believe that cases referred to them require further investigation, a judge will be appointed to investigate and report back with recommendations, as now. A new feature is that the judicial office-holder concerned will be able to refer the case to a Review Body of two judicial office-holders and two lay members, if he or she is unhappy with the outcome.

Judicial Appointments and Conduct Ombudsman

Another new feature is the Judicial Appointments and Conduct Ombudsman. He or she will be able to consider complaints about both the appointments process and the handling of judicial disciplinary matters.

There will be provision for report and recommendations. There will be power to require that a complaint be reconsidered and to refer it to the Review Body, but no power to order that a particular person be appointed to a post, or that a conduct complaint should be resolved in a particular way.

I hope that these important changes can be managed in a way that provides reassurance, both for ourselves and for

the wider public, that the independence of the judiciary, including the tribunal judiciary, will continue to be upheld, and that the appointment and disciplinary processes will be fair, impartial and open to scrutiny.

LORD JUSTICE CARNWATH is the Senior President designate of tribunals.

I take this opportunity to announce that Professor Martin Partington, currently a Law Commissioner, has agreed to act as my research adviser on the tribunal reform project. As a long-standing advocate of tribunal reform, and a former member of the Leggatt team, he is very well-qualified to take on this role. It will also link in to his continuing work for the Law Commission, particularly on housing law disputes, and on administrative law remedies. I have also agreed with Lord Newton, Chairman of the Council on Tribunals, that we will establish a joint group to co-ordinate and draw conclusions from existing and future research on all aspects of the tribunal service.

NEW ROLES, NEW OFFICES

A description of the historic changes brought about by the Constitutional Reform Act 2005.

The Constitutional Reform Act received Royal Assent on 24 March 2005, putting the Concordat agreed by the Lord Chancellor and the Lord Chief Justice in 2004 on a statutory footing. The Concordat is an agreement drawn up between the Lord Chancellor and the Lord Chief Justice, outlining their new responsibilities. For the Lord Chief Justice this includes his new role as Head of the Judiciary in England and Wales, to commence in April 2006.

Office for Judicial Complaints

A number of responsibilities will pass from the Lord Chancellor to the Lord Chief Justice with this title in relation to tribunal members. These include, among others, his joint responsibility with the Lord Chancellor for conduct and discipline, supported by the new Office for Judicial Complaints. Work is ongoing to clarify how the Lord Chief Justice intends to delegate the functions conferred upon him by the Constitutional Reform Act in respect of tribunals, and how this relates to any future legislation to establish the position of Senior President of tribunals on a statutory footing.

Judicial Office for England and Wales

The Lord Chief Justice and senior judiciary will be supported in their new roles and responsibilities by the Judicial Office for England and Wales. The director of the new office will be appointed later this year. The Office will be responsible for judicial well-being and will act as a first point of contact for all the judiciary, including tribunal members where they sit in England and Wales, on issues such as retirements and resignations. The new office, based in the Royal Courts of Justice, will begin work in April 2006.

The changes brought about by the Act include:

- A change in the responsibilities of the Lord Chancellor and Lord Chief Justice.
- A new Office for Judicial Complaints that will report jointly to the Lord Chancellor and the Lord Chief Justice.
- A new Judicial Office for England and Wales, to support the Lord Chief Justice in his new role.
- The creation of a Judicial Appointments Commission.
- A new Judicial Appointments and Conduct Ombudsman.

There are some areas where the work of this new office and the support team for the new Senior President of tribunals will inevitably overlap. The project teams are working closely together to establish the links and relationships between them.

Lord Chancellor's new role

The Lord Chancellor will continue to be a Government Minister responsible for the judiciary and the courts system, but will no longer be a judge or head of the judiciary.

The offices currently within the DCA will be reorganised to reflect the Lord Chancellor's changed responsibilities and the creation of the Judicial Appointments Commission (JAC) and

the Office for Judicial Complaints. From April 2006, the DCA will support the Lord Chancellor in his statutory duty to protect the independence of the judiciary and in performing his judiciary-related functions and responsibilities. This will include advising on the operation of the Concordat and the Constitutional Reform Act.

The Lord Chancellor and the Queen will continue to appoint judges, so the DCA will deal with recommendations from the Judicial Appointments Commission and the formalities of making appointments, as well as ensuring that serving and retired judicial office-holders are remunerated efficiently. Working in partnership with the judiciary, the DCA will develop and implement relevant policies, such as that relating to eligibility for judicial office. The DCA will provide the appropriate level of sponsorship to the JAC, Judicial Appointments and Conduct Ombudsman and the Office for Judicial Complaints.

Judicial Appointments Commission

The Judicial Appointments Commission will also come into existence in April 2006. This will be the first time in history that only a person recommended to the Lord Chancellor by an independent body (it will be a non-departmental public body) can be appointed to judicial offices. The JAC will provide an opportunity to make the system of judicial appointments both more open and more efficient. It will remove from the executive the day-to-day responsibility for selecting candidates for appointment.

It will be responsible for recommending candidates to court and tribunal posts, ensuring that the system continues to deliver judges of the highest quality and that can continue to inspire public confidence. The JAC will also take responsibility for the appointment of magistrates and General Commissioners of Income Tax, once it has notified the Lord Chancellor that it is ready to do so. One of the key objectives of the Commission will be to look at increasing the diversity of applications for judicial posts in all areas.

The introduction of the JAC will bring a change in the current appointment process for tribunals alongside other areas of the judiciary. This is driven by the appointment of the 14 Commissioners and chair to the Commission. Both the chair and the Commissioners will be involved in the selection process as laid down in the Constitutional Reform Act 2005 and will be able to develop and improve the appointment process to meet the needs of the Commission, candidates and its customers. A large proportion of the Commission's work will be in relation to tribunal appointments, the current remit increasing as tribunal appointments move to the new Tribunals Service, also in April 2006.

An announcement on the appointment of the Commission's chair will be made in September this

year. The process for the selection of the 14 further Commission members, one of whom will be a tribunal specialist, has begun. The chair and five further Commission members will be lay people, selected from outside the judicial system.

An independent appointing panel, chaired by Sir Nigel Wicks, is undertaking the selection of the chair and Commissioners, three of whom will be nominated by the Judges' Council. The appointments will be made by the Queen.

This will be the first time in history that only a person recommended to the Lord Chancellor by an independent body... can be appointed to judicial offices.

Judicial Appointments and Conduct Ombudsman

Finally, the Judicial Appointments and Conduct Ombudsman will play a vital role in ensuring the integrity and transparency of the new framework for judicial appointments. The ombudsman will investigate and make recommendations on any complaints from candidates for judicial office about the handling of their applications and matters relating to procedures of the JAC. The ombudsman will also play a role in investigating complaints about the handling of judicial conduct complaints by the Office for Judicial Complaints.

He or she will report and make recommendations, but will not be able to order that a particular person be appointed to a post, or that a conduct complaint should be resolved in a particular way. He will, however, be able to require that a complaint be reconsidered and to refer it to the Review Body.

The recruitment campaign to identify the inaugural ombudsman is currently under way. The successful candidate will be announced at the end of the year and will formally take on the statutory functions of the new office when it is established in April 2006.

The Act is available at www.opsi.gov.uk/acts/acts2005/20050004.htm



JUST *a* PHONE CALL AWAY

WALTER MERRICKS *describes one way that proportionate dispute resolution can work in practice.*

The White Paper *Transforming Public Services: Complaints Redress and Tribunals*, published in July 2004, places emphasis on ‘proportionate dispute resolution’ and the development of ‘a range of policies and services that, so far as is possible . . . 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 envisages ‘the development of a range of tailored dispute resolution services, so that different types of dispute can be resolved fairly, quickly, efficiently and effectively, without recourse to the expense and formality of courts and tribunals where this is not necessary’. It mentions the private sector ombudsmen schemes generally and the Financial Ombudsman Service (FOS) in particular.

It cites some of the key features of these ombudsman schemes: the ability to deal with lots of cases relatively inexpensively, to resolve issues quickly and largely in private using informal methods, a focus on what really matters to the user – resolving the dispute, and as far as possible getting a fair result that is dependent on the respective strengths of the parties’ cases rather than how well-presented. More particularly, it cites the ways in which the FOS works, with tiers of intervention from initial advice to mediation or conciliation, to adjudication (offering an indication of the likely outcome), to a final decision by the ombudsman.

While acknowledging that such schemes could not be carried over unchanged into tribunals, the White Paper believes the Government has much to learn from the ‘success of ombudsman schemes’, namely ‘flexible dispute resolution . . . and a different scale of operation, so that the public receive a service tailored to their needs’.

The FOS in practice

The FOS was set up under the Financial Services and Markets Act 2000 to promptly and informally resolve individual disputes between consumers (including small businesses and charities with a yearly turnover or income of under £1 million) and financial firms such as banks, building societies, insurance companies and advisers in areas such as the mis-selling of endowment mortgages and disputed insurance claims. Ombudsman decisions are binding on the firm if accepted by the consumer and can be enforced in court. There is a financial limit on awards – £100,000 – and the decisions of the ombudsman are based not just on the law, the terms of the contract, industry statements and codes but also on what is fair and reasonable in all the circumstances of the case.

To give some indication of the scale of our activities, in 2004–05 we handled more than 600,000 consumer enquiries and received just fewer than 111,000 new complaints. We have more than 950 staff based on a single site in London’s Docklands, about 25,000 financial firms are subject to our jurisdiction and our expenditure in 2005–06 will be £53 million. But in 2004–05, despite a 13 per cent rise in new cases, we managed to resolve 90,908 cases at a unit cost of £496 while maintaining high levels of customer satisfaction.

Flexibility

This could not have been achieved without a flexible approach linked to the complexity of the dispute and a minimal use of formal hearings (fewer than 20 a year). Our approach has three basic stages, but the starting point is that not all complaints go through every stage. The procedural approach we take depends on the facts and merits of each individual case, and we use our formal

powers only when complaints cannot be resolved earlier. Last year, only one in six enquiries (110,963 out of 614,148) went on to become cases (that is, went on to the second stage described below), and only seven per cent of those 110,963 cases reached the third and final stage, an ombudsman's decision.

The first stage is our customer contact division. This is similar to a call centre and deals with all frontline consumer enquiries. The FOS can only take on cases after the parties have already tried, and failed, to resolve their complaint, either through some kind of deadlock or because the firm has exceeded the timescales laid down by the regulator (the Financial Services Authority). The final stage in a firm's formal complaints procedure is a final response letter in which the firm sets out a summary of the complaint and its final view on the issues.

At this early stage, our customer contact division looks for opportunities to sort matters out right at the start, with perhaps a couple of phone calls. Last year (2004–05) our customer contact division resolved 12,721 complaints in this way.

We encourage consumers to telephone us – that way, we can identify better whether the issue is really one for us and, if so, can set the consumer's expectations as to our process. The application form to bring a complaint before the ombudsman service can be partially completed by us while the consumer is on the telephone. It is then sent to the consumer for signature and return. We make a note of their version of the problem, in their own words, along with exactly what they want as an outcome. We can also ensure that the consumer understands exactly what we can and cannot do.

Casework

The second stage of our procedural approach is casework. The role of our caseworkers (termed adjudicators) is to resolve the case by the means most appropriate for the case – informal mediation, guided

conciliation or formal investigation. We aim to give an early and reasoned view on the merits – this helps weed out apparently weak cases early on and very quickly gets to the real issues in the case. But we allow the losing party to make representations before we make a final decision. All cases first go through an initial sift to see whether they can be resolved through guided mediation. The firm's final response letter and the consumer's application form give us the chance to see how far apart the parties really are. Where it is obvious from the outset that a case is one of the minority that is going to need a great deal of investigation, it will be allocated to an investigation team straight away.

Our approach has three basic stages but the starting point is that not all complaints go through every stage.

Provisional view

Whatever route a case goes down, the adjudicator will make a primary assessment of the written evidence of both sides. We call this early neutral evaluation of the evidence a 'provisional view'. In many cases, we have enough information at the outset to form a provisional view but might need, in accordance with our inquisitorial approach, to phone either party for additional information, obtain

additional written information from either party or, very rarely, seek expert third-party advice.

Once we have formed a provisional view of the likely outcome, we put this in private (fairly informally either over the telephone or in writing) to the party we think has the weaker case. We give our reasons why the complaint is likely or unlikely to succeed and invite a response telling us why we are wrong. Very often a neutral analysis actually resolves the dispute. Last year, 55 per cent of our cases were resolved at this stage.

Adjudication

In cases where the provisional view has not resolved the complaint, we raise the formality level. We prepare a formal written analysis of the dispute giving our assessment of the merits (an 'adjudication') and send this to both parties so that the party with the weaker case

knows that the other party knows the likely outcome. An adjudication is still not final. The parties are required to accept the adjudication or make further representations. A further 38 per cent of cases last year were resolved at this stage.

Ombudsman

The third and final stage in our process, reached last year by only seven per cent of cases, is a final decision by an ombudsman. This is a final, written determination prepared if either or both parties dispute an adjudication. It does not automatically reach the same view as an adjudication. But if any further representations made at the post-adjudication stage mean that a change of view is necessary, we will issue a provisional decision, again to both parties so that, unlike a court or tribunal decision, no final decision comes as a surprise.

Hearings are very rarely necessary – we needed only 11 formal hearings last year.

Because firms have already had the chance to resolve complaints before they come to us, the cases we see usually involve parties in fairly entrenched positions. We uphold only a minority of complaints (in the normal run, about 30 per cent), but we get an overall satisfaction rating of about 80 per cent from complainants. Of those who felt that they had ‘lost’ their case, 63 per cent were satisfied with our handling of their complaint.

While we offer what we believe is a fair process and one that complies with human rights, it is not modelled on the adversarial court system.

We are able to take advantage of our experience of seeing many similar cases to identify key issues at an early stage. And we deploy our adjudicative authority as appropriate to the complexity of the facts or issues, and appropriate also to the degree to which the parties are resistant to the initial views we express. We start tentatively at first, raising the level as necessary, reacting to the responses we receive from the parties. So harder fought cases take longer to resolve.

Of those who felt that they had ‘lost’ their case, 63 per cent were satisfied with our handling of their complaint.

But, as remarked in the White Paper, we don’t just decide cases. We promote dispute reduction or avoidance and consciously intend that our decisions should influence (and improve) first-instance decision-making by firms. We also work hard to ensure that frontline consumer advice agencies are aware of the FOS and the types of cases we can deal with.

We issue a free monthly newsletter, ‘ombudsman news’, which contains case studies and articles on our approach to common complaints. It is available on our website and sent to subscribers in firms, consumer advice agencies and other bodies. We hold an annual series of conferences under the title ‘working together’ for firms that include briefings and workshops on the way the ombudsman is likely to view certain complaints.

We operate an advice desk for firms and the consumer advice sector, which can give informal (non-binding) guidance on our practice and procedures and our approaches to cases, including information on where to find anything we have published on a particular topic. In our experience, this enables firms and consumer advisers to settle many complaints before they are referred to the FOS. And, of course, we engage with the Government, regulators (to whom we report systemic issues), firms, trade and professional bodies and national consumer groups. This can influence regulatory policy recommendations.

Clearly the FOS model cannot be translated wholesale into the tribunals arena. However, a process that can deliver economic high-volume complaint resolution while retaining high levels of customer satisfaction must surely have features that would commend themselves in other dispute resolution fields.

WALTER MERRICKS is Chief Ombudsman of the Financial Ombudsman Service. The FOS website is at www.financial-ombudsman.org.uk



HIGH VOLUME, HIGH QUALITY



ELAINE KEMPSON and NICK MOORE describe their research, which led them to conclude that the service provided by the Financial Ombudsman Service was fair, reasonable and efficient.

Our assessment was commissioned by the FOS Board. Its overall aim was to evaluate the work of the Service, in particular in relation to four issues: quality, consistency, process and value. Using a combination of interviews and focus groups, we talked to more than 100 of the 725 staff employed at that time. We examined the processes that supported their work and carried out an audit of 72 closed cases.

Quality

The quality of case-handling is generally high, despite the pressures of increasing volumes of work. The organisation is permeated by a culture that emphasises the importance of quality. As a consequence, staff at all levels are committed to providing a quality service and are proud to work for an organisation with this as a core value.

There is also a clear focus on the customers and their needs. A case management system prompts staff to keep in touch with customers about their case. Customers also get a named contact, with a direct telephone number, at all stages. This is not to say that the FOS is on the side of consumers – in about seven out of 10 cases it finds in favour of the firm. The Service has a number of quality assurance systems and carries out regular satisfaction surveys of users, firms and staff.

Consistency

One of the aims of the Service is to ensure that 'like complaints are dealt with in like ways, producing like outcomes'.

*'Our overall view is that the Financial Ombudsman Service is a thoughtful, well-managed organisation that is doing a good job under difficult circumstances.'*¹

While, in order to do this, cases are assigned to broad categories to be dealt with by adjudicators with an appropriate background, each case is assessed on its merits and in the light of the circumstances that gave rise to it. There is, therefore, an inevitable tension between the need for consistency of approach and individual treatment of cases.

Overall, we found that there was a high degree of consistency. We attributed this to a number of factors.

First, there is a collegial approach, whereby adjudicators work in teams and are encouraged to consult with and

support colleagues. New staff are supported by a system of mentoring by team leaders. All adjudicators are also supported by the ombudsmen who work in their subject area. The ombudsmen are available for consultation on particular cases – some even hold regular surgeries to which adjudicators can bring difficult cases.

There is an intranet-based knowledge management system that, among other things, contains guidance notes written by ombudsmen. Adjudicators can easily refer to these to learn how to approach cases. The guidance notes also feed into the training provided to new staff.

Process

The processes used to handle the high volumes of enquiries and cases are robust and fit for their purposes. A measure of their success is the fact that the Service has been able to keep pace with an increase in complaints from 28,400 in 2000–01 to 97,900 in 2003–04.

The process itself is focused on the timely resolution of disputes using relatively informal mediation to begin with, before moving to more formal adjudication and decision by ombudsman.

An important element of the Service's work is concerned with the prevention of future disputes. FOS tries hard, in a variety of ways, to inform and educate the firms with which it deals so that they understand the thinking behind the decisions. Firms should then be able to avoid practices that are likely to lead to disputes or, failing that, to resolve disputes before they get as far as the FOS.

Value

Overall, we found that the Service offers good value for money. The case-handling process, in particular, is efficient and really quite cheap – indeed the unit cost of handling cases by adjudicators and ombudsmen fell from £730 to £473 in the four years to 2003–04. If all the cases that are resolved at an early stage without the need for an adjudicator or ombudsman are included, the unit cost falls to only £220. The key to this seems to be that the Service deals quickly and relatively informally with complaints and cases that can be resolved easily. Indeed, one of the business units concentrates on handling this type of case. This allows scarce resources, such as more highly skilled or experienced staff, to be deployed in more intractable cases. Clearly, however, such a system requires a fairly sophisticated process at the outset to identify the cases that are amenable to informal resolution.

There is an inevitable tension between the need to maintain high levels of output and, at the same time, to deal with cases on their individual merits in a balanced way. In the FOS, the high output levels are encouraged by a system of personal targets allied to a system of incentive payments. This is balanced by the quality assurance systems, which are largely based on peer review of cases.

The position has been exacerbated by the rapid, and seemingly inexorable, increase in the number of complaints and cases. It would have been possible simply to increase the number of adjudicators and ombudsmen in direct proportion to the increased case load. To have

done so, however, would have been to unbalance the organisation by reducing significantly the proportion of experienced staff and, in so doing, jeopardising the quality of the service. The chosen alternative was to keep the increase in staff numbers to a manageable level while, at the same time, increasing productivity.

Interestingly, we found no evidence to suggest that high levels of output were associated with low levels of quality. Indeed, it seemed that the opposite was often the case – the adjudicators who consistently exceeded their targets often produced work of the highest quality.

Management and culture

The importance of the organisation's general culture and management style should not be minimised. We found in the FOS a very open and supportive management style, running throughout the organisation.

The organisational culture was also important. Staff generally were strongly committed to the organisation's aims and values and they identified strongly with them. They were, for example, passionate about the quality of the service that they provided. This is something that, in our experience, is not commonly found in large organisations dealing with high volumes of work.

At the conclusion of our assessment we were left with two enduring impressions. First, surprise that such a highly regulated part of the economy could generate such a high, and growing, number of unresolved complaints. Secondly, respect for an organisation that is managing to resolve so many of those complaints in a manner that is fair, reasonable and efficient.

ELAINE KEMPSON is Professor of Personal Finance and Social Policy Research at the University of Bristol.

PROFESSOR NICK MOORE is the managing director of Acumen Research and Consultancy (www.acumenuk.co.uk).

The research was carried out by the Personal Finance Research Centre at the University of Bristol.

¹ See www.financial-ombudsman.org.uk/publications/pdf/kempson-report-04.pdf at page 39.



WHEN CONTACT CAN *be* CRUCIAL

What should happen if a party fails to turn up? And when should a chairman's experience affect the listing of a case? GODFREY COLE describes how two recent cases hold some of the answers.

The Employment Appeal Tribunal (EAT) addressed this issue in *Cooke v Glenrose Fish Co* [2004] IRLR 866, following the dismissal by an Employment Tribunal (ET) of the applicant's claim for unfair dismissal when neither he nor his solicitor turned up for the hearing. A different chairman, at a later date, then refused to review (called setting aside in some jurisdictions) the tribunal's decision.

The reasons for the refusal were that Mr Cooke had been notified and had not attended, he had the remedy of seeking compensation from his solicitors, and because the wasted hearing could not be properly compensated for by an award of costs. It subsequently transpired that the reason for the solicitors' non-appearance was because of a culpable error on their part, and they were on the record as Mr Cooke's representatives.

Allowing the appeal, the EAT reconsidered and reiterated its decision in *London Borough of Southwark v Bartholomew* [2004] ICR 358. That was a case where there was the clearest possible situation in which the tribunal ought to have made enquiries before taking the course it did to investigate the non-attendance of the respondent. In that decision, the EAT had expressly approved the practice, when a party fails to appear, of a tribunal trying to contact the party by telephone to enquire whether he intends to appear.

In *Cooke*, the EAT took some time considering guidance that had been issued to ET chairmen since *Bartholomew*. It emphasised that there was 'no need for volunteering of assistance [by the other party's representative] if it be not called for'. But it concluded that it was still clearly right

to say that in the exercise of its judicial discretion in any particular case:

'... a tribunal must *consider* whether to telephone, and must... enquire further particularly of a represented other party what news there is or was of the other party, and as to whether in those circumstances it is possible that the other party is delayed or has forgotten about the matter but was, so far as can be understood, intending to come.'

Cooke relates to one tribunal jurisdiction... but the problem it addressed is by no means uncommon.

Further, where even a brief look at the papers would have shown that an applicant's solicitors had been actively involved in the case not long before, there would need to be a very good reason why a telephone call had not been made, and the decision not to attempt to contact the party must carry with it, as new guidance to ET chairmen suggested, the opportunity to put the matter right on a review or a set-aside application.

Of course, *Cooke* relates to one tribunal jurisdiction that has its own rules, including the power to award costs, which is not widespread among tribunals, but the problem it addressed is by no means uncommon. All tribunals meet large numbers of unrepresented parties – or rather they don't if there is no attendance despite having been given proper notice. Most jurisdictions have a review or set-aside power. Until *Cooke*, that would have been the stage to consider whether a hitherto unexplained absence should be accepted. *Cooke* goes a stage further by, if not requiring, certainly expecting an attempt to make some contact before proceedings get under way. If there is no reply, then the tribunal can proceed without more, but what

about the party who is grateful for the reminder and says they will be with the tribunal in some specified period of time? Does the tribunal wait, hoping the time promised is correct, or does it proceed to adjourn to another date? Or, would it make any difference if there had been a previous adjournment for non-attendance and good reason for that earlier absence had been established? No answers on those as yet – good sense will have to prevail.

And in *Cooke*? There the EAT allowed the appeal, set aside the order made by the chairman who refused the application for review and recommended that the original ET decision be set aside with the matter being sent back for a substantive hearing before a different tribunal.

Another case to ponder, this time from the courts, is *Stevens v Newey* (2005) *The Times*, 14 January, where the question to resolve was whether there had been any undue influence when shares in a tenancy in common had been created. The matter had been allocated, under the Civil Procedure Rules, to the multi-track by a designated civil judge, and listed before a district

judge. The latter had refused to hear oral submissions from counsel after hearing the evidence and had failed to resolve conflicts between the parties' evidence. The Court of Appeal concluded that the district judge had been incorrect in that approach.

Of particular interest in this context is the Court of Appeal's further observation that the designated civil judge – for which read full-time chairman or regional chairman or President depending on the jurisdiction – should consider the nature of the case and the skills and experience of the person likely to hear the case before allowing him to do so.

Now that approach is simply not possible in *every* case without instituting a filter that would almost certainly be ruled out on grounds of cost or delay. It is worth thinking about, though, if the file has been selected to be put before a full-time member of the judiciary before listing, possibly because of its complexity, or if it has been set aside (on which see *Cooke* above), or has been sent back following a successful appeal.

SYSTEMATIC RESEARCH

The Department for Constitutional Affairs has commissioned research on ethnic diversity and the tribunal system, addressing questions such as:

- To what extent is there evidence of direct or indirect discrimination against ethnic minorities within the tribunal system?
- Do questions of race influence tribunal decisions, and if so how?

To address these and other questions, the research looked at the expectations and experiences of white and minority ethnic users in three tribunals – the Appeals Service, Criminal Injuries Compensation Appeals Panels and the Special Educational Needs Tribunal.

The approach of the research has been to interview over 500 tribunal users while they were waiting for their tribunal hearing; to accompany users during their

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hearing to observe the interaction between themselves and the tribunal; to interview users about their views on the hearing before receiving their decision; and finally, when possible, to interview users again after receiving their decision.

The research represents the first systematic attempt to explore the expectations and experiences of minority ethnic tribunal users. It also provides a wealth of observational information about the dynamics of tribunal hearings, including the enabling activity of the tribunal judiciary and the extent to which tribunal users are able effectively to participate in tribunal hearings.

The tribunals and diversity research project has been undertaken by Professor Hazel Genn, Ben Lever and Lauren Gray. The final report will be published on the DCA's website at the end of 2005 at www.dca.gov.uk/research/introfr.htm

The AUSTRALIAN WAY



Early this year, the Administrative Appeals Tribunal of Australia produced its own Framework of Competencies. MARY HOLMES describes its genesis.

The Administrative Appeals Tribunal (AAT) is a federal jurisdiction that reviews, on the merits, a broad range of administrative decisions made by the Australian Government, including ministers and officials, authorities and other tribunals. In reviewing these decisions, the AAT normally has the same powers as the original decision-maker and can substitute its own decision for that of the original decision-maker. The Tribunal also reviews administrative decisions made by some State government and non-government bodies in limited circumstances. Appeal lies from the AAT to the Federal Court on a point of law.

The breadth of jurisdiction of the AAT, in contrast to tribunals in the UK, is considerable and all legal members will be expected to undertake hearings across a wide range of jurisdictions, although some of the more complex and sensitive areas are confined to the most senior full-time legal members. Many of the members, both legal and specialist, are trained mediators – this is an important element of the AAT dispute resolution process.

While the Framework acknowledges its derivation from the JSB model and in many ways is very similar, it has also had to reflect the tribunal's recently revised statutory objective to provide 'a mechanism of review that is fair, just, economical, informal and quick'. The legislation specifically empowers the President to direct an application for review to 'alternative dispute resolution processes, including conferencing, mediation, neutral evaluation, case appraisal and conciliation'. Thus a seventh competency, 'Facilitation and case management skills', was identified to reflect this additional element.

These skills are most commonly applied pre-hearing or, occasionally, at the start of the hearing. All members are expected to use facilitation and case management skills, where appropriate, and to encourage parties to negotiate and settle their disputes. They may use conciliation,

mediation or other dispute resolution skills to help them. Where a member has specialist expertise in ADR, the competency requires an understanding of the relevant ADR process models and the practise of ADR skills.

The addition of this competency reflects a significant difference from the skills currently required in most tribunal jurisdictions in England and Wales. The White Paper *Transforming Public Services: Complaints, Redress and Tribunals* does, however, identify a number of ADR processes for consideration that are already part of the Australian tribunal dispute resolution process.

The Framework forms part of the work that I undertook when I visited the tribunal in 2004. I had been invited by its President, Judge Garry Downes, to advise the tribunal on whether the JSB's models for appraisal and mentoring, as well as its Competence Framework, could be adapted for use by the AAT as part of its recently introduced AAT Professional Development Programme.

My consultation involved visiting all AAT registries, each of which is situated in the capital city of the states and in Canberra and took the form of an interactive seminar in which the members in each registry were asked to look at the JSB models for appraisal and mentoring and identify the issues that would inform adaptation of those models for use by the AAT.

On returning to England, and with guidance from the AAT working group, I designed the frameworks and schemes to address the particular structure and terms of appointment of the jurisdiction.

A subsequent consultation was undertaken with each registry, amendments made by consultation through e-mail and telephone, and final schemes were delivered at the end of March 2005, along with a final report to the President.

MARY HOLMES is the JSB's Head of Tribunals Training.



Judicial Studies Board